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In the Supreme Court of the United States

October Term, 1992

COMMONWEALTH OF MASSACHUSETTS, et al
Petitioners,

v.

GREENWOOD TRUST COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 91-2205
92-1065
92-1150

GREENWOOD TRUST COMPANY,
Plaintiff, Appellant,

v.

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Defendants, Appellees.

APPEALS FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. William G. Young,
U.S. District Judge]

Before

Selya, Circuit Judge,

Lay,* Senior Circuit Judge,

and Pieras,** District Judge.

Arthur R. Miller, with whom Andrew F. Lane, Gilbert R. Hoy, Jr., Warner & Stackpole, Burt M. Rublin, Wolf, Block, Schorr and Solis-Cohen, Alan R. Feldman, and Sullivan & Worcester were on brief, for appellant.

Ernest L. Sarason, Jr. and William T. Matlack, Assistant Attorneys General, with whom Scott Harshbarger, Attorney General, and Sarah Wald, Special Assistant Attorney General, were on brief, for appellees.

Frank Max Salinger and Robert E. McKew on brief for American Financial Services Association, amicus curiae.

Arnold M. Lerman, Christopher R. Lipsett, John B. Bellinger, III, Kenneth L. Chernof, and Wilmer, Cutler & Pickering on brief for Bank of America, et al., amici curiae.

John J. Gill, Michael F. Crotty, and Irving D. Warden on brief for American Bankers Association, amicus curiae.

Ralph J. Rohner, Marcia Z. Sullivan, and Steven I. Zeisel on brief for Consumer Bankers Association, amicus curiae.

L. Richard Fischer, Robert M. Kurucza, Steven S. Rosenthal, James A. Huizinga, and Morrison & Foerster on brief for Visa U.S.A., Inc. and Mastercard International Incorporated, amici curiae.

Alfred J.T. Byrne, General Counsel, Douglas H. Jones, Senior Deputy General Counsel, Thomas A. Schulz, Assistant General Counsel, Colleen B. Bombardier, Senior Counsel, and Lisa M. Miller, Counsel, on brief for Federal Deposit Insurance Corporation, amicus curiae.

Marsha Kramarck, Deputy Attorney General, on brief for Delaware State Bank Commissioner, amicus curiae.

Richard P. Eckman, Daniel I. Prywes, Joseph L. Lakshmanan, and Pepper, Hamilton & Scheetz on brief for Delaware Bankers Association, amicus curiae.

Lee Fisher, Attorney General (Ohio) and Kathleen McDonald O'Malley, Chief Counsel, Office of Attorney General, on brief for States of Ohio, Arizona, Illinois, Louisiana, Nevada, South Dakota and Utah, amici curiae.

Bonnie J. Campbell, Attorney General (Iowa), and Peter R. Kochenburger, Assistant Attorney General, on brief for States of Arkansas, Colorado, Connecticut, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maine, Minnesota, New Jersey, North Carolina, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, West Virginia and the District of Columbia, amici curiae.

Michael M. Malakoff, Ellen Doyle, Malakoff, Doyle & Finberg, Nicholas E. Chimicles, Michael D. Donovan, Robin Resnick and Greenfield & Chimicles on brief for Bankcard Holders of America, et al., amici curiae.

James C. Sturdevant, Kim E. Card, Sturdevant & Sturdevant, and Gail Hillebrand on brief for Consumer Action and Consumers Union, amici curiae.

Albert Endsley, Steven W. Hamm, and Philip S. Porter on brief for National Conference of Uniform Consumer Credit Code States and American Conference of Uniform Consumer Credit Code States, amici curiae.

August 6, 1992

*Of the Eighth Circuit, sitting by designation.
**Of the District of Puerto Rico, sitting by designation.

SELYA, Circuit Judge. This train wreck of a case arises out of a headlong collision between a state consumer-protection law and a federal banking law. It brings into sharp focus the tensions inherent in our federalist system while presenting a novel legal question: can a federally insured bank, chartered in Delaware, charge its Massachusetts credit-card customers a late fee on delinquent accounts, notwithstanding a Massachusetts statute explicitly prohibiting the practice? The district court answered this

question in the negative, enforcing the state statute and granting partial summary judgment in appellees' favor. Because we believe that the lower court was on the wrong track, we reverse. Federal law has the right of way in this area.

I.

Background

The pertinent facts are largely undisputed. Plaintiff-appellant Greenwood Trust Company (Greenwood) is a Delaware banking corporation. Its deposits are insured by the Federal Deposit Insurance Corporation. Through a wholly owned subsidiary, Greenwood offers an open end credit card - the Discover Card - to customers nationwide. More than one hundred thousand of its cardholders live in Massachusetts.

The terms and conditions applicable to use of the Discover Card are spelled out in a Cardmember Agreement. The Agreement stipulates, inter alia, that the holder must make a minimum monthly payment, calculated by reference to the credit-card balance outstanding from time to time, on or before a designated due date. Failure to make this payment in a timeous fashion constitutes a default. If the default is not cured within twenty days, a ten-dollar late charge is automatically assessed.

On October 27, 1989, the Commonwealth of Massachusetts advised Greenwood that its imposition of late charges under such circumstances contravened state law. The Commonwealth threatened to take legal action. Greenwood promptly launched a preemptive strike, filing a complaint for

declaratory and injunctive relief in the United States District Court for the District of Massachusetts.[1/] The Commonwealth denied that federal law preempted the Massachusetts statute. It also counterclaimed, seeking to bar Greenwood from assessing late charges and to collect restitutionary damages, together with civil penalties, referable to Greenwood's defiance of state law.

The district court adjudicated the parties' competing claims on cross-motions for summary judgment. Discerning no federal preemption, the court ruled that Massachusetts law applied. Since the court interpreted

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1/ Greenwood's suit invoked the Supremacy Clause of the federal Constitution. The Commonwealth and its Attorney General were named as defendants. For simplicity's sake we refer to both defendants as "the Commonwealth."

that law to forbid Greenwood's imposition of late charges upon cardholders who lived in Massachusetts, it denied Greenwood's motion and granted partial summary judgment in the Commonwealth's favor. Greenwood Trust Co. v. Massachusetts, 776 F. Supp. 21 (D. Mass. 1991). The district court certified its rulings for interlocutory appeal under 28 U.S.C. §1292(b) (1988). In light of the pivotal importance and broad commercial consequence of the questions presented, we accepted the certification. (As an aside, we remark that our belief as to the importance of the questions presented has been validated to some degree by the outpouring of amicus briefs, some favoring appellant's position and some opposing it.) These appeals

ensued.[2/]

II.

The Statutory Scheme

Two statutes lay at the heart of the dispute between these protagonists: the state law that prohibits the imposition of late fees by credit-card issuers, viz., Mass. Gen. L. ch. 140, §114B (1991) (Section 114B), and the federal law which arguably preempts the state statute, viz., Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDA), Pub. L. No. 96-221, 94 Stat. 132 (1980) (codified, as amended, in scattered sections of the U.S. Code). This case demands that we determine whether

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2/ Endeavoring to ensure that its flanks are fully protected, Greenwood has prosecuted three separate appeals, each with a different jurisdictional thrust. It is not necessary for us to distinguish among them.

section 114B's immovable prohibition survives section 521's irresistible preemptive sweep.

The Massachusetts statute is straightforward. It provides that: "No creditor shall impose a delinquency charge, late charge, or similar charge on loans made pursuant to . . . an open end credit plan." Mass. Gen. L. ch. 140, §114B.

On the other hand, section 521 is equally uncompromising:

> In order to prevent discrimination against State-chartered insured depository institutions, including insured savings banks, . . . with respect to interest rates, . . . such State bank[s] . . . may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in

> effect at the Federal Reserve bank in the Federal Reserve district where such State bank . . . is located or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.

12 U.S.C. §1831(d)(a) (1988 & Supp. 1990).

III.

Discussion

A.

Preemption: General Principles

In Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), Chief Justice Marshall declared that, under the rubric of the Supremacy Clause,[3/]

3/ The Supremacy Clause provides that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., art. VI, cl. 2.

state laws which "interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution," are preempted and, therefore, invalid. Id. at 211. This verity remains firmly embedded in our modern jurisprudence. See, e.g., Wisconsin Pub. Intervenor v. Mortier, 111 S. Ct. 2476, 2481 (1991); Hillsborough County v. Automated Medical Labs., Inc., 471 U.S. 707, 712 (1985); Securities Indus. Ass'n v. Connolly, 883 F.2d 1114, 1117 (1st Cir. 1989), cert. denied, 495 U.S. 956 (1990).

In placing constitutional theory into practice, the Court has generally distinguished between express and implied preemption. Express preemption occurs "when Congress has 'unmistakably . . . ordained' that its enactments alone are to regulate a [subject, and] state laws regulating

that [subject] must fall." Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963)). In such instances, the only remaining question is whether a particular state statute intrudes into the federal pale. See Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299 (1988); Cable Television Ass'n v. Finneran, 954 F.2d 91, 98 (2d. Cir. 1992).

Implied preemption comes in a wide variety of sizes and shapes. Indeed, we have said that "[t]he concept . . . has a certain protean quality, which renders pigeonholing difficult." French v. Pan Am Express, Inc., 869 F.2d 1, 2 (1st Cir. 1989). Implied preemption can occur when Congress constructs a scheme of federal regulation "so pervasive as

to make reasonable the inference that Congress left no room for the States to supplement it"; or when an "Act of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject"; or when the goals of, and obligations imposed by, the federal law make manifest a purpose to uproot state law. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); accord Mortier 111 S. Ct. at 2481-82; English v. General Elec. Co., 496 U.S. 72, 79 (1990). Implied preemption can also occur in situations involving actual conflicts, such as when compliance with both federal and state regulation is an impossibility, see, e.g., Florida Lime, 373 U.S. at 142-43, or when state law "stands as an obstacle

to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

Certain common strands bind these diverse species of express and implied preemption together. Two such threads run through the fabric of the instant case. For one thing, in any preemption analysis, "the question of whether federal law preempts a state statute is one of congressional intent." French, 869 F.2d at 2; accord Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478, 482 (1990); Securities Indus., 883 F.2d at 1117. For another thing, the different strains of preemption all operate on "the assumption that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose

of Congress." Rice, 331 U.S. at 230; see also, Mortier, 111 S. Ct. at 2482; California v. ARC America Corp., 490 U.S. 93, 101 (1989). Courts must tread cautiously in this arena because the authority to displace a sovereign state's law is "an extraordinary power . . . that we must assume Congress does not exercise lightly." Gregory v. Ashcroft, 111 S. Ct. 2395, 2400 (1991). Even federal statutes that contain express preemption clauses must be viewed through the prism of this assumption. See, Cipollone v. Ligget Group, Inc., 60 U.S.L.W. 4703, 4706-07 (U.S. June 24, 1992) (plurality opinion); id. at 4711 (Blackmun, J., concurring in part and dissenting in part).

B.

The Track We Must Travel

We move now from the general to the particular. Section 521 boasts an express preemption clause. In recent days, the High Court has made it pellucidly clear that, whenever Congress includes an express preemption clause in a statute, judges ought to limit themselves to the preemptive reach of that provision without essaying any further analysis under the various theories of implied preemption. See Cipollone, 60 U.S.L.W. at 4707 (plurality opinion); id. at 4711 (Blackmun, J., concurring in part and dissenting in part). Given the teachings of Cipollone and the plain language of section 521 ("notwithstanding any State constitution or statute which is hereby preempted for

the purposes of this section"), we reject the Commonwealth's contention that this is an implied preemption case.[4/]

Our conclusion that the proper analysis in this case reduces to an inquiry into express preemption is

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4/ The district court apparently accepted the Commonwealth's position and treated the case as one of implied preemption. See Greenwood Trust, 776 F. Supp. at 30. It is likely that this error derived from the miasma of doubt surrounding the applicability of section 521 in Massachusetts. The district court believed that the Commonwealth had exercised its right, under section 525 of DIDA, 12 U.S.C. §1730(g) note (since repealed by Title IV of FIRREA, Pub. L. No. 101-73, 103 Stat. 183, 363 (1989)), to opt out of section 521's preemptive grasp. See, e.g., Greenwood Trust, 776 F. Supp. at 24 n.6, 26, 30 & n.24, 35. The court overlooked, however, that although Massachusetts opted out in 1981, see 1981 Mass. Acts 231, it reversed direction and, in effect, opted back in well before this litigation began. See 1986 Mass. Acts 177 (repealing pertinent portions of 1981 Mass. Acts 231). Section 521 is, therefore, fully applicable to the instant case.

unaffected by the fact that the inquiry requires us to interpret the terms "interest" and "interest rates" as they are employed in section 521. While uncertainty about the meaning of interstitial terms in the text of a federal statute may affect the scope of express preemption, it does not bear directly on the character of Congress's preemptory intent. See Cipollone, 60 U.S.L.W. at 4707-10 (plurality opinion); id. at 4711-14 (Blackmun, J., concurring in part and dissenting in part); Cable Television, 954 F.2d at 98. In other words, so long as Congress's intent to effect preemption remains clear and manifest, uncertainty which pertains only to the contours of the ensuring preemption does not necessitate an alteration of a reviewing court's basic analytic approach.

C.

The Scope of Express Preemption Under Section 521

We must still resolve the crucial question of what state laws are preempted. Put specifically, is a state law banning the imposition of late charges a law regulating "interest" within the purview of section 521? If so, chapter 114B is preempted.

This inquiry necessarily reduces to ascertaining what Congress meant by the word "interest" in drafting section 521. In divining this legislative intent, it is incumbent upon us to "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031-2036

(1992) (quoting FMC Corp. v. Holliday, 111 S. Ct. 403, 407 (1990)). In the process, however, we should not wear blinders: if there is "good reason to believe" that Congress intended to deviate from the ordinary meaning of the language selected, then a reviewing court must follow the congressional lead. Cipollone, 60 U.S.L.W. at 4708 (plurality opinion) (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983)); see also American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982).

Should perlustration of a statute's text fail to disclose the scope of Congress's preemptory intent, we must then assess the statute's structure and purpose in order to probe Congress's wishes. Ingersoll-Rand, 111 S. Ct. at 482; FMC Corp., 111 S. Ct. at 407. Moreover, a court, faced with

the necessity of delineating a facially cryptic statute's preemptive scope, can repair to statutory history and legislative context in order to facilitate its inquiry into congressional purpose. See Toibb v. Radloff, 111 S. Ct. 2197, 2200 (1991); Blum v. Stevenson, 465 U.S. 886, 896 (1984).

1.

The Commonwealth urges, and the lower court determined, Greenwood Trust, 776 F. Supp. at 36-38, that section 521's language plainly limits its preemptory impact to state laws that govern numerical interest rates, thereby leaving state laws regulating flat fees unscathed - even when, as here, such fees arise out of the extension and maintenance of credit. We are not persuaded that the plain meaning of

"interest" and/or "interest rates" as used in section 521 requires so grudging an interpretation.

In the first place, we do not believe that the plain meaning of "interest" necessarily restricts the definition of the word to numerical percentage rates. Reference works typically define interest as "a charge for borrowed money[,] generally a percentage of the amount borrowed." Webster's Ninth New Collegiate Dictionary 630 (1989) (emphasis supplied); see also Black's Law Dictionary 812 (6th ed. 1990). Such definitions do not limit interest to numerical percentage rates, for they simply note that interest is often, but not always, expressed as a percentage. If the Commonwealth's circumscribed view of the word were accurate, there would

be no basis for suggesting that exceptions exist.

Judicial opinions also tend to shy away from limiting the word "interest" to numerical percentage rates. Specifically, federal case law has long suggested that, in ordinary usage, interest may encompass late fees and kindred charges.[5/] See e.g., Shoemaker v. United States, 147 U.S. 282, 321 (1893) ("Interest

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5/ Since we are interpreting the terms of a federal statute in a dispute between Massachusetts and a Delaware bank, we do not believe that definitions of interest emanating from courts in other states are relevant to our inquiry, except insofar as those cases purpose to interpret DIDA or its forebears. In any event, such state-law definitions go both ways. Compare, e.g., Perry v. Stewart Title Co., 756 F.2d 1197, 1207-08 (5th Cir. 1985) (under Texas law, late charges are not a component of interest) with, e.g., Swindell v. Federal Nat'l Mortgage Ass'n, 409 S.E.2d 892, 894-95 (N.C. 1991) (under North Carolina Law, late charges are a component of interest).

accrues either by agreement of the debtor to allow it for the use of money, or, in the nature of damages, by reason of the failure of the debtor to pay the principal when due."); Brown v. Hiatts, 82 U.S. (15 Wall.) 177, 185 (1873) ("[i]nterest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as damages for its detention").

Thus, the door is open to appellant's interpretation of the term. Suggesting that an additional fee attached to a delinquent, defaulted account is related to the creditor's cost of lending that money does no violence to language, to precedent, or, indeed, to logic. Default necessarily increases the creditor's cost of processing a loan. Therefore, a late fee is sufficiently related to the "use

or forbearance of money, or . . . damages for its detention" that it can appropriately be classified as "interest."

In the second place, the use of words like "rate" in conjunction with the word "interest" does little to advance the Commonwealth's thesis. While there may exist support for the assertion that a flat fee is not included in the plain meaning of terms such as "rate" and "interest rates," section 521's preemptive reach cannot so easily be restricted to numerical percentage rates. Terms in an act whose meaning may appear plain outside the scheme of the statute can take on a different meaning when read in their proper context. See United Steelworkers of America v. Weber, 443 U.S. 193, 201 (1979); Train v. Colorado Pub. Interest

Research Group, Inc., 421 U.S. 1, 10 (1976). As Judge Learned Hand once wrote, words can be "chameleons, which reflect the color of their environment." Commissioner v. National Carbide Corp., 167 F.2d 304, 306 (2d. Cir. 1948), aff'd, 336 U.S. 422 (1949).

In short, the plain-meaning doctrine is not a pedagogical absolute. This rule of construction is more "an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence" in contradiction to supposedly plain meaning if such evidence exists. Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928) (Holmes, J.). Hence, a court must always hesitate to construe words in a statute according to their apparent meaning if to do so would defeat Congress's discovered intendment. See

Bob Jones Univ. v. United States, 461 U. S. 574, 586 (1983); Watt v. Alaska, 451 U. S. 259, 266 (1981); Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892). It follows that:

> deference to the plain meaning rule should not be unthinking or blind. We would go beyond the plain meaning of the statutory language when adherence to it would produce an absurd result or an unreasonable one plainly at variance with the policy of the legislation as a whole.

Massachusetts Fin. Servs., Inc. v. Securities Investor Protection Corp., 545 F.2d 754, 756 (1st Cir. 1976) (citations and internal quotation marks omitted), cert. denied, 431 U.S. 904 (1977); accord In re Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 643 (1978).

Viewed as part of this mise-en-scene, the Commonwealth's plain-meaning argument cannot carry the

day. The argument gathers little steam because the use of the terms "interest" and "interest rates" in section 521 is an example of how phrases' meanings can take on different colorations when read in their legislative and historical context. Accordingly, we must move beyond the plain-meaning doctrine to determine the scope of express preemption under section 521.

2.

The preamble to section 521 states that the law was created "to prevent discrimination against State-chartered insured depository institutions, including insured savings banks." To understand the reference, we examine the historical context.

As the 1970s wound down, the Nation was caught in the throes of a devastating credit crunch. Interest

rates soared. See, e.g., United States v. Ven-Fuel, Inc., 758 F.2d 741, 764 n.20 (1st Cir. 1985)(cataloguing fluctuations in the prime rate from 1975 to 1983). Nevertheless, state lending institutions were constrained in the interest they could charge by state usury laws which often made loans economically unfeasible from a lender's coign of vantage. See Gavey Properties/762 v. First Fin. Sav. & Loan, 845 F.2d 519, 521 (5th Cir. 1988); Bank of New York v. Hoyt, 617 F. Supp. 1304, 1309 (D.R.I. 1985). National banks did not share this inhibition because they could charge whatever interest rates were allowed under the National Bank Act of 1864, c. 106, 13 Stat. 99 (1864) (codified, as amended, in scattered sections of 12 U.S.C.) (the Bank Act), and specifically, those rates

which were permitted under Bank Act §85, 12 U.S.C. §85 (1988), quoted infra note 7. Since section 85 authorized national banks to use interest rates set by reference to federal discount rates, state institutions were at an almost insuperable competitive disadvantage.[6/]

Congress tried to level the playing field between federally chartered and state-chartered banks when it enacted DIDA. See 126 Cong. Rec. 6,907 (1980) (section 521 will "allow[] competitive equity among financial institutions, and

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6/ Section 85 was originally enacted to shield national banks from state laws that were discriminating against them. See Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299, 314-18 (1978); Cong. Globe, 38th Cong., 1st Sess. 2126 (1864) (statement of Sen. Sherman). More than a century later, this shield had become a sword wielded by national banks against state-chartered lenders. As we have written before, "irony is no stranger to the law." Amanullah v. Nelson, 811 F.2d 1, 18 (1st Cir. 1987).

reaffirm[] the principle that institutions offering similar products should be subject to similar rules") (statement of Sen. Bumpers); 126 Cong. Rec. 6,900 (1980) (section 521 should "provide[] parity, or competitive equality, between national banks and State[-]chartered depository institutions on lending limits") (statement of Sen. Proxmire). To achieve this objective, Congress engrafted onto DIDA's bare bones, at several points, language taken from the Bank Act. Section 521, modeled on section 85 of the Bank Act, was the site of one such transplantation.[7/]

7/ We consider the transplanted language to be the following:

> [A state-chartered, federally insured depository institution], with respect to interest rates,

(footnote continued)

(footnote continued)

> . . . may . . . take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank . . . is located or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.

12 U.S.C. §1831(d)(a) (DIDA §521). The comparison between this language and the language of section 85 is striking. The latter provided in relevant part:

> [A national bank] may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater . . . .

12 U.S.C. §85 (1988) (Bank Act §85). Although there are niggling variations,

(footnote continued)

The parallelism was not mere happenstance. To the exact contrary, Congress made a conscious choice to incorporate the Bank Act standard into DIDA. See, e.g., 126 Cong. Rec. 6,907 (1980) (statement of Sen. Bumpers); 125 Cong. Rec. 30,655 (1979) (statement of Sen. Pryor); see also Gavey, 845 F.2d at 521.

The historical record clearly requires a court to read the parallel provisions of DIDA and the Bank Act in pari materia. It is, after all, a general rule that when Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts should be

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(footnote continued)

the key phraseology is substantially identical. Accord Gavey, 845 F.2d at 521 (interpreting 12 U.S.C. §1730(g)(a), a section of DIDA containing language parallel to section 521).

interpreted the same way. See Morales, 112 S. Ct. at 2037; Ingersoll-Rand, 111 S. Ct. at 485-86; Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979). So here. What is more, when borrowing of this sort occurs, the borrowed phrases do not shed their skins like so many reinvigorated reptiles. Rather, "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947). Because we think it is perfectly plain that this portable soil includes prior judicial interpretations of the transplanted language, see Holmes v. Securities Investor Protection Corp., 112 S. Ct. 1311, 1317-18 (1992); Pierce v. Underwood, 487 U.S. 552, 567 (1988); Lorillard v. Pons, 434 U.S. 575, 580-581

(1978), Bank Act precedents must inform our interpretation of words and phrases that were lifted from the Bank Act and inserted into DIDA's text.

While we believe that several principles inherent in section 85 were transfused into section 521, the critical item for present purposes is the principle of exportation. This principle, solidly embedded in the language and purpose of both acts, provides the mechanism whereby a bank may continue to use the favorable interest laws of its home state in certain transactions with out-of-state borrowers.[8/] See Marquette Nat'l Bank

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8/ The exportable rates are those available to the most favored lenders in the bank's state, not merely those available to lenders of a similar size, character, or function. See Tiffany v. National Bank of Missouri, 85 U.S. (18 Wall.) 409, 411-13 (1874).

v. First of Omaha Serv. Corp., 439 U.S. 299, 313-19 (1978); Gavey, 845 F.2d at 521. To the extent that a law or regulation enacted in the borrower's home state purposes to inhibit the bank's choice of an interest term under section 521, DIDA expressly preempts the state law's operation.

Read in this way, the language borrowed from Bank Act §85 and incorporated into DIDA §521 achieves parity between national banks and their state-chartered counterparts by allowing lenders such as Greenwood to choose among three interest rate ceilings: (1) the highest rate lawfully permitted without reference to section 521; (2) a rate not more than one percent above the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the federal reserve district where the

lender is located; or (3) the highest rate allowed by the laws of the state where the lender is located. Section 521's express preemption clause is designed to maintain this parity. Acting in combination with the principle of exportation, this clause necessarily derails any state-sponsored attempt to regulate the maximum interest chargeable by a federally insured bank chartered in another state. For our purposes, this means that any Massachusetts law applicable to Greenwood must yield to the preemptory force of section 521 insofar as the regulation of "interest" is concerned.

We reach this conclusion mindful of the fact that the state statute here at issue visits two areas which are squarely within the ambit of the states' historic powers - banking, see, e.g.,

Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve Sys., 472 U.S. 159, 177 (1985); Valley Bank v. Plus Sys. Inc., 914 F.2d 1186, 1195 (9th Cir. 1990), and consumer protection. See, e.g., ARC America, 490 U.S. at 101; General Motors Corp. v. Abrams, 897 F.2d 34, 41-42 (2d Cir. 1990). Although this circumstance means that any preemption provision must be construed cautiously and with due regard for state sovereignty, see Cipollone, 60 U.S.L.W. at 4706-07 (plurality opinion); id. at 4711 (Blackmun, J., concurring in part and dissenting in part), it does not serve as a buckler against the force of the Supremacy Clause. When Congress has acted within its authority and its intent to displace state law is clear - preconditions which obtain here - preemption is not foreclosed by the fact

that the federal statute intrudes into the range of subjects over which the states have traditionally exercised their police powers.[9/] See Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982).

3.

To be sure, the impuissance of the Commonwealth's plain-meaning argument signifies only that the terms "interest" and "interest rates" as used in section 521 are susceptible to interpretation - not that the Commonwealth's interpretation of those terms is necessarily wrong or that the appellant's interpretation is

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9/ By the same token, the relative importance of a state law to a state sovereign is immaterial when that law is displaced by valid federal statute, for the Framers provided that the federal law must prevail. See Free v. Bland, 369 U.S. 663, 666 (1962).

necessarily correct. To like effect, our recognition of DIDA's ancestry, while illuminating, provides us with no definitive answer to the precise question at hand. Since DIDA's text and legislative history are, at bottom, inconclusive, we must look either to federal common law or to state law to give content to the terms in question.

In general, the words and phrases contained in a federal statute are defined by reference to federal law. See Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 43 (1989); Jerome v. United States, 318 U.S. 101, 104 (1943). There are two compelling reasons for adhering to this praxis. First, application of state-law definitions may threaten the policies or interests which a federal statute is designed to serve. See United States v. Kimbell Foods, Inc., 440 U.S. 715, 728

(1979); Burks v. Lasker, 441 U.S. 471, 479 (1979). Second, application of state-law definitions may disrupt Congress's desire for nationwide uniformity under a federal statute. See Kamen v. Kemper Fin. Servs., Inc., 111 S.Ct. 1711, 1717 (1991); Mississippi Band, 490 U.S. at 43-44.

Resort to uniquely federal definitions is not, however, automatic. "Congress sometimes intends that a statutory term be given content by the application of state law." Mississippi Band, 490 U.S. at 43. In such instances, a federal court may properly use state law to fill the interstices within a federal legislative scheme. See, e.g., Kamen, 111 S. Ct. at 1722-23 (holding it proper to borrow a definition from state corporate law); Mississippi Band, 490 U.S. at 47-53

(allowing state-law definition of "domicile" to inform a federal definition); Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197, 204-05 (1982) (similar, in corporate-law context); De Sylva v. Ballentine, 351 U.S. 570, 580-81 (1956) (borrowing definition from state domestic relations law); Reconstruction Fin. Corp. v. Beaver County, 328 U.S. 204, 208-10 (1946) (borrowing definition from state property law). This "does not mean that a State would be entitled to use [a statutory term] in a way entirely strange to those familiar with its ordinary usage, but at least to the extent that there are permissible variations in the ordinary concept [of that term] we [may] deem state law controlling." De Sylva, 351 U.S. at 581.

In this case, we need not decide

whether federal or state law is the appropriate point of reference. Since both sources produce the same result, it would be a mere matter of form - and idle - to choose between them. See Royal Business Group, Inc. v. Realist, inc., 933 F.2d 1056, 1064 (1st Cir. 1991) (eschewing choice of law where, whatever the choice, the result of the litigation would not be affected); Fashion House, Inc. v. K Mart Corp., 892 F.2d 1076, 1092 (1st Cir. 1989) ("When a choice-of-law question has been reduced to the point where nothing turns on more precise refinement, that should be the end of the matter.") We illustrate briefly.

a.

Section 521 allows a state bank to charge interest "at the rate allowed by the laws of the State . . . where the

bank is located." We think this is a fairly clear indication that, if a state-law definition of interest is applicable, it must emanate from Delaware law. We so hold, much bolstered by the recognition that section 85 "adopts the entire case law of [a state bank's home] state interpreting the state's limitations on usury; it does not merely incorporate the numerical rate adopted by the state." First Nat'l Bank v. Nowlin, 509 F.2d 872, 876 (8th Cir. 1975); accord Roper v. Consurve, Inc., 777 F. Supp. 508, 510-11 (S.D. Miss. 1990), aff'd, 932 F.2d 965 (5th Cir.) (table), cert. denied, 112 S. Ct. 181 (1991). Our conclusion is further fortified by the knowledge that several other federal tribunals, in addition to the Nowlin and Roper courts, have interpreted identical

language in section 85 of the Bank Act as adopting definitions drawn from the law of the state where the bank is located. See, e.g., Daggs v. Phoenix Nat'l Bank, 177 U.S. 549, 555 (1900); Union Nat'l Bank v. Louisville, N.A. & C. Ry., 163 U.S. 325, 331 (1896); NCNB Nat'l Bank v. Tiller, 814 F.2d 931, 937 (4th Cir. 1987), overruled on other grounds by Busby v. Crown Supply, Inc., 896 F.2d 833, 840-42 (4th Cir. 1990) (en banc); Bartholomew v. Northampton Nat'l Bank, 584 F.2d 1288, 1295 (3d Cir. 1978); McAdoo v. Union Nat'l Bank, 535 F.2d 1050, 1055-58 (8th Cir. 1976); NorthwayLanes v. Hackley Union Nat'l Bank & Trust Co., 464 F.2d 855, 861-64 (6th Cir. 1972).

Delaware law explicitly incorporates late charges into the definition of

interest and allows lenders to assess such fees against credit-card customers. See Del. Code Ann. tit. 5, §950 (1985 and Supp. 1990). Thus, were we to look to Delaware law for help in fathoming the meaning of "interest" and "interest rates," late charges would be included. In that event, section 114B's prohibition on late fees would be nullified by section 521's express preemption of state laws limiting exported interest rates.

b.

Federal common law brings us to precisely the same result. Several courts, in analyzing the language of section 85 of the Bank Act, have had little trouble in construing the term "interest" to encompass a variety of lender-imposed fees and financial

requirements which are independent of a numerical percentage rate. See, e.g., American Timber & Trading Co. v. First Nat'l Bank, 690 F.2d 781, 787-88 (9th Cir. 1982) (compensating balance requirement); Fisher v. First Nat'l Bank, 548 F.2d 255, 258-61 (8th Cir. 1977) (fee for cash advance); Panos v. Smith, 116 F.2d 445, 446-47 (6th Cir. 1940) (taxes and recording fees); Cronkleton v. Hall, 66 F.2d 384, 387 (8th Cir.) (bonus or commission paid to lender), cert. denied, 290 U.S. 685 (1933); Nelson v. Citibank (South Dakota) N.A., ___ F. Supp. ___, ___ (D. Minn. 1992) [1992 W.L. 112166 at *6-*9] (late fees). Fairly read, these opinions expand the scope of section 85 preemption - and, by implication, the scope of section 521 preemption - well

beyond periodic percentage rates.[10/]

10/ The court below relied upon the legislative history of DIDA §501, 12 U.S.C. §1735f-7a, to support the proposition that late charges are not a component of interest under section 521. Greenwood Trust, 776 F. Supp. at 29-32. Congress enacted section 501 as an amendment to the National Housing Act, while section 521 altered the Federal Deposit Insurance Act. The mere fact that both of these sections fell under the broad umbrella of DIDA does not make them fair congeners. Since DIDA contains an amalgam of different provisions, the legislative history and purpose of one section of DIDA does not necessarily inform the interpretation of all other parts of that law. See Bank of New York, 617 F. Supp. at 1311-13. As we have stated, "it is not unusual for the same word to have differing connotations in the same act and surely no canon of statutory construction forecloses courts from attributing to the word the meaning which the legislature intended that it should have in each instance." Sherman v. Hamilton, 295 F.2d 516, 520 (1st Cir. 1961), cert. denied, 369 U.S. 820 (1962); see also Dewsnup v. Timm, 112 S. Ct. 773, 777-78 (1992). This sentiment seems especially apropos in view of the fact that section

(footnote continued)

While we are aware that many of these cases involve the intrastate extension of loans by national banks rather than the exportation of interest rates, the analogy is persuasive. Furthermore, some of them do involve exportation. For example, Fisher concerned a credit-card cash advance fee charged by a Nebraska bank to a customer residing in Iowa. The court suggested

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(footnote continued)

501 addresses different categories of lenders and loans and contains materially different preemption terms than does section 521.

In light of the irrefutable evidence that section 521 was conceived as an offspring of section 85 of the Bank Act, we believe that the district court's reliance upon a comparison between it and DIDA §501 was misplaced. The proper analogy in this case is to compare lineal descendants who share common language and purpose, not distant cousins who share little more than a name.

that this fee was a component of the "rate of interest", making no distinction between the meaning of "interest" in intrastate, as opposed to interstate, transactions. Fisher, 548 F.2d at 258-61. For our part, we can discern no principled basis for such a distinction.

4.

It is, moreover, obvious that construing the terms "interest" and "interest rates" to include late charges fits most comfortably with the rationale undergirding section 521. DIDA was enacted in order to strike a competitive balance between state and national lending institutions by giving them equal power in charging interest rates. Allowing state banks to charge the same or similar fees in connection with the extension and maintenance of credit as national banks are allowed to charge

ensures parity between the two types of institutions.

Such a construction also finds broad support in the rulings and informal opinion letters of the various agencies charged with interpretating the meaning of section 85 and section 521. See, e.g., 12 C.F.R. §7.7310(a) (1992) (ruling of the Comptroller of the Currency to the effect that all of a bank's home-state laws "material to the determination of the interest rate" are exportable); Letter by Robert B. Serino, Deputy Chief Counsel of the Office of the Comptroller of Currency, [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶85, 676 (Aug. 11, 1988) (concluding that, under Bank Act §85, state-law prohibition of late charges may be preempted); Letter by Harry W. Quillian, Acting General Counsel of the

Federal Home Loan Bank Board 3 (June 27, 1986) (similar, interpreting DIDA §522).[11/]

We need not grease the rails. Given our conclusion that DIDA §521 should be interpreted *in pari materia* with its direct lineal ancestor, section 85 of the Bank Act, and given, also, the litany of cases extending section 85 to a wide variety of fees and charges associated with the extension and maintenance of credit, we see no reason to define either the term "interest" or the term "interest rates," for purposes of section 521, in a manner that excludes late fees.

11/ We need not join the parties' heated debate over the level of deference these materials deserve, for we would reach the same result independent of any reliance on them.

IV.

Conclusion

When Congress furnishes clear and unequivocal evidence of its preemptory mindset in the text of a statute, the "task of discerning congressional intent is considerably simplified." Ingersoll-Rand, 111 S. Ct. at 482. Here, section 521 provides with undeniable clarity that usury laws in effect in the borrower's state may be preempted as applied to federally insured banks chartered in other states.

With respect to the specific scope of section 521's preemption, section 85 of the Bank Act long ago laid the track upon which the parties must now travel. Section 85's preemption acts as a cowcatcher by brushing aside states' attempts to regulate "interest rates" charged by national banks. Included

within those displaced state laws are regulations regarding flat fees analogous to late charges. In passing DIDA, Congress expressly placed section 521 on the same footing. Hence, "interest" in section 521 encompasses late fee charges to credit-card customers. Section 114B, which prohibits the assessment of late charges, thereby regulates the interest a bank may charge in a more restrictive manner than federal law permits.

We need go no further.[12/] For the reasons set forth above, it is patent that the state statute is on a collision course vis-a-vis section 521.

12/ Inasmuch as we conclude that section 114B is preempted, we need not confront various other issues addressed by the court below. See Greenwood Trust, 776 F. Supp. at 39-47. We take no view of any such issues.

Given the imperatives of the Supremacy Clause, the whistle sounds loud and clear. Section 114B must yield. It is preempted.

Reversed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

GREENWOOD TRUST COMPANY, Plaintiff,	)	
v.	)	CIVIL ACTION No. 89-2583-Y
THE COMMONWEALTH OF MASSACHUSETTS, and JAMES M. SHANNON, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, Defendants.	)	

FINAL JUDGMENT
UNDER FED. R. CIV. P. 54(B)

This matter having come on for hearing with respect to Greenwood Trust Company's ("Greenwood") Motion for Summary Judgment and the Commonwealth of Massachusetts' ("the Commonwealth") Motion for Summary Judgment, and the cross-motions for summary judgment

having been fully briefed by the parties and oral argument having been held, pursuant to the Court's Memorandum and Order of October 22, 1991 and the Supplement to the Court's Memorandum and Order of October 22, 1991, and the Court finding that there is no just reason for delay, it is hereby ordered, adjudged, and decreed and the Court enters final judgment pursuant to Fed. R. Civ. P. 54(b) as follows:

1. Mass. Gen. L. c. 140, §114B is not preempted by the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-211, Stat. 132.

2. The issue of late charges between Greenwood and Discover Card cardmembers residing in Massachusetts is governed by Massachusetts law and not by Delaware law, notwithstanding a contrary

choice of law provision in Greenwood's Cardmember Agreement.

3. The prohibition on credit card late charges in Massachusetts General Laws c. 140, §114B applies to Greenwood, a Delaware bank.

4. Greenwood has imposed late charges on Discover Card cardmembers residing in Massachusetts in violation of Massachusetts General Laws c. 140, §114B.

5. The Commonwealth is granted final judgment in its favor on Greenwood's Complaint for Declaratory and Injunctive Relief.

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Dated:

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

GREENWOOD TRUST COMPANY, Plaintiff,	)	
v.	)	CIVIL ACTION No. 89-2583-Y
THE COMMONWEALTH OF MASSACHUSETTS, and JAMES M. SHANNON, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, Defendants.	)	

MEMORANDUM AND ORDER

YOUNG, D.J. October 22, 1991

I. INTRODUCTION

This case raises a variety of novel and complex issues involving the interstate extension of consumer credit via credit cards and the concomitant regulation of the issuers of such credit cards by the several states. As the

parties and the amici[1/] point out, this appears to be a case of genuine first impression, both in this Circuit and through-out the United States.[2/]

The parties and amici have

1/ Amicus curiae briefs in support of the Greenwood Trust Company have been filed by the Delaware State Bank Commissioner and Delaware Bankers Association, Consumer Bankers Association, American Financial Services Association, Mastercard International, Inc., and VISA USA, Inc.

The following have filed amicus curiae briefs in support of the Commonwealth of Massachusetts and its Attorney General: the states of Iowa, Maine, Minnesota, South Carolina, and Wisconsin ("the amici states"), the National Association of Consumer Credit Administrators and the American Conference of Uniform Consumer Credit Code States.

The Court expresses its appreciation to all the amici for their able briefs and most helpful assistance in addressing these important issues.

2/ The amici states in their brief call to the Court's attention several recent cases raising some similar issues

(footnote continued)

extensively and skillfully briefed the primary issue as they conceive it: May Greenwood Trust Company ("Greenwood"), a federally-insured, state-chartered bank located in Delaware, assess its "Discover" credit card holders located in Massachusetts a late charge on delinquent accounts, a charge permitted in Delaware but prohibited in Massachusetts?[3/]

(footnote continued)

brought in the Iowa State courts. (Amici States' Br. at 7 and n. 7, 9). These cases, all of which settled short of judicial resolution on the merits, involved Iowa's attempt to enforce against national banks located in Iowa certain policies with respect to cardholder agreement late charges, choice of law, and other provisions.

3/ More broadly stated, the issue is: may a bank located in a state with permissive consumer lending laws take advantage of those favorable non-interest rate provisions in its own state's laws and "export" them to or impose them upon residents of another state which maintains greater consumer protection for its residents when they borrow in that state?

Resolution of this important question necessarily requires the Court to address two subsidiary issues -- a major question of federal preemption that concerns both the parties and the amici, and a lesser but potentially pivotal question of statutory interpretation of Massachusetts banking legislation, a matter that concerns the parties alone. The major question requires the Court to determine whether Massachusetts banking law is preempted under the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2., by section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980, United States Pub. L. No. 96-221 §521, 94 Stat. 132 (1980) ("DIDA"). If so, the prohibition of the Massachusetts usury law against such late charges must yield. If not, it

would appear that Greenwood must prevail unless, of course, the Massachusetts usury law itself, Mass. Gen. L. ch. 140, §114B, does not contemplate regulation of out-of-state credit card issuers such as Greenwood. Greenwood makes this argument, and the Commonwealth and its Attorney General demur.

Where, then, ought analysis begin? If Massachusetts law does not reach out-of-state credit card issuers, then this Court need not address the thorny issue of federal preemption -- an issue of nationwide significance. Conversely, if federal law preempts state regulation, this federal court need not -- and should not -- undertake to analyze the legislative intent of the Massachusetts legislature. Here the Court ultimately concludes, first, that federal law does <u>not</u> preempt

Massachusetts from barring late charges in credit card agreements; and second, that Massachusetts may prohibit Greenwood from collecting the presently disputed late charges under credit card agreements with Massachusetts citizens. Accordingly, though the outcome thus turns ultimately upon state law, resolution of the federal preemption issue is likewise necessary to determine whether to engage in an analysis of the Massachusetts statute.[4/]

4/ Greenwood, in its complaint, alleged that Massachusetts' enforcement of its late charge prohibition would violate the Commerce clause of the United States Constitution. (Complaint, ¶¶1, 5, 22-25.) This claim was not, however, pressed beyond that initial mention and does not appear in any briefs or oral arguments submitted by Greenwood in connection with the present motion for summary judgment.

II. STATEMENT OF MATERIAL UNDISPUTED FACTS[5/]

The plaintiff Greenwood is a Delaware banking corporation insured by the Federal Deposit Insurance Corporation. Greenwood, through its wholly-owned subsidiary, Discover Card Services, Inc., located in Illinois, issues the "Discover" credit card to customers nationwide, including several hundred thousand residents of Massachusetts. Greenwood actively

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5/ The parties agreed to submit the liability issues to the Court for resolution on their cross-motions for summary judgment. As required by Local Rule 18, the Commonwealth submitted a Statement of Material Undisputed Facts ("Statement") with its motion. Greenwood submitted no Statement in support of its motion. Thus, consistent with Rule 18, the Court takes as admitted by Greenwood the material facts set forth in the Commonwealth's Statement. Unless otherwise noted, affidavits, depositions, and other documents referred to here are attached to that Statement.

solicits cardmember applications nationwide through direct mail, telemarketing, and "take one" applications; it also conducts multi-media advertising nationwide. (Plaintiff's Answer to Interrog., No. 4).

Though Greenwood does not directly employ personnel in Massachusetts to make loans, Discover Card Services maintains a Massachusetts office with approximately eight employees. (Plaintiff's Answer to Interrog. No. 13[c]). That office solicits merchants in Massachusetts to accept the Discover Card. Id.

Pursuant to its Cardmember Agreement, Greenwood charges a monthly periodic rate of 1.5 percent to accounts in all states which have opted out of DIDA and 1.65 percent to accounts in all

other states.[6/] Cardmember Agreement ("Agreement") ¶15.

Greenwood also imposes a $10.00 "late charge" if a required payment is not made within 20 days after the payment due date in any month. (Agreement ¶17). Failure to make at least the minimum payment due by the due date in any month puts the cardmember in default. (Agreement ¶¶11, 18). Greenwood does not include late charges in its computation or disclosure of the Annual Percentage Rate in either Cardmember Agreement or monthly billing statement. (Plaintiff's Answer to

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6/ Massachusetts is a state which in 1981 elected to override, or "opt-out" of DIDA pursuant to Section 525 of that Act. Mass. Stat. 1981 ch. 231. Fourteen other states and Puerto Rico have enacted similar legislation.

Interrog. No. 15). It does separately identify the late payment charge in the Cardmember Agreement, and separately identifies finance charges and late payment charges on the monthly billing statement as "Finance Charges" and "Late Charges." Id.; (Agreement ¶¶13, 17). A Discover Card finance charge is imposed on unpaid balances, which include unpaid late charges. (Dep. of Robert Stormoen at 86-88). Multiple late fees are assessed in successive billing cycles for continuing unpaid balances past the 20-day period. Id. at 88-90. A finance charge is then imposed on unpaid balances, including multiple late charges. Id. at 89-90.

The purposes of Greenwood's late charges are to deter default, compensate it for additional collection expenses, and provide it with a source of revenue

in addition to interest charges. (Plaintiff's Answer to Interrog. No. 5; Stormoen Dep. at 62-63). The payment of a late charge per se does not influence Greenwood's decision as to whether to extend further credit or suspend credit privileges.[7/] (Stormoen Dep. at 26).

Greenwood's late charges to Massachusetts residents involve a substantial sum of money, the amount of which the parties have agreed to keep confidential. (Statement ¶2). The Cardmember Agreement contains a choice of law provision specifying that the

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7/ Both Greenwood and amici Mastercard and Visa have argued that late charges are either components of finance charges or material to determination of the rate of interest. This Court rejects that argument as untenable on the undisputed material facts of record. See infra at 39-44.

Agreement "will be governed by the laws of the State of Delaware and applicable federal laws." (Agreement ¶25). Greenwood has never permitted a Massachusetts resident to enter into a Discover Cardmember Agreement on terms different from those on its printed form agreement, including the choice of law provision.

III. ANALYSIS

A. Preemption: The Federal DIDA Statute and State Usury Laws

1. Background of Federal and Massachusetts Legislation.

The present controversy between Greenwood and Massachusetts traces to the increasingly unsettled relations among banks, state regulators, and federal authorities over the last decade, since abrupt changes in Federal Reserve monetary policies and bank

deregulation have intensified interstate competition among financial institutions. The fast-growing credit card industry is a sphere of particular importance and interstate conflict as cards issued by 50,000 financial institutions and offices are now carried by over seventy million Americans, who used them in transactions amounting to well over $400,000,000,000 in 1989.[8/]

Since the early years of the Republic, the states have generally resisted the development of national banks and favored their own state chartered banks through regulatory

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8/ R. Burgess & M. Ciofli, Exportation or Exploitation? A States Regulator's View of Interstate Credit Card Transaction, 42 Bus. Law., 929 (1987); Mastercard International Inc. and VISA U.S.A., Inc. Br. 1-2.

legislation[9/] and the Supreme Court has, since McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), generally limited federal statutory involvement by construing preemption narrowly and giving relatively free rein to state usury law regulations. See Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944); McClellan v. Chipman, 164 U.S. 347 (1896).

The National Bank Act of 1864, c. 106, 13 Stat. 99 (1864), favored the national banks and protected them from discriminatory state laws;[10/]

9/ O. Scroogs, A Century of Banking Progress 50-51 (1924), J. Knox, A History of Banking in the U.S. 12 (2d ed. 1969), as cited in the brief of the Consumer Bankers Association, 5-8.

10/ See Northway Lanes v. Hackley Union Nat'l Bank & Trust Co., 464 F.2d 855, 861 (6th Cir. 1972); Consumer Bankers Association Br. 8-10.

and since 1933 they have been allowed to charge interest at one percent above the Federal Reserve discount rate or at the highest rate available to competing state banks under laws of the state named in their charter. Banking Act of 1933, ch. 89, §25, 48 Stat. 191.

The interest rates of state and national banks were comparable until 1979, when the Federal Reserve rate rose sharply, giving national banks a competitive advantage in states with lower usury law interest ceilings. The national banks' advantages were further enhanced through the Supreme Court's decision in Marquette Nat'l Bank v. First of Omaha Service Corp., 439 U.S. 299 (1978). The Marquette Court held that national banks were only required to comply with interest restrictions of

their charter state when doing business in that state; and that they could disregard other states' interest ceilings when doing business outside their home state.[11/]

The bleeding of capital from state banks to the national banks created a serious shortage of mortgage loan monies in many states by the late 1970s. The housing industry was especially affected by high interest rates and the dwindling of state bank mortgage capital.[12/]

Congress responded to the unprecedented crisis of simultaneous recession and inflation by enacting

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11/ See Burgess & Ciofli, supra note 8 at 935-36.

12/ Id. See William M. Burke & Alan S. Kaplinsky, Unraveling the New Federal Usury Law, 37 Bus. Law. 1079, 1096 (1982).

DIDA[13/] -- the Depository Institutions Deregulation and Monetary Control Act of 1980.[14/] Section 521 of DIDA allowed state banks, like the national banks, to charge interest at the federal rate and thereby preempted state usury laws. 12 U.S.C. §1831d. At the same time, Congress also recognized the continued importance of state consumer protection laws. Section 525 of DIDA gave states three years to enact legislation to

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13/ Usury Lending Limits: Hearings on S. 1988 Before the Senate Committee on Banking, Housing and Urban Affairs, 96th Cong., 1st Sess. (1979) ("Usury Lending Limits Hearings").

14/ DIDA was omnibus legislation that, in the respects relevant here, amended various statutes, including the Home Owners Loan Act (Section 501), the Federal Deposit Insurance Act (Section 521), the National Housing Act (Section 522), and the Federal Credit Union Act (Section 523). Each of these sections is amended by and subordinated to Title V of DIDA.

override the preemption provisions of the Federal Act. 12 U.S.C. §1730g note.

Spurred by the same financial crisis, Massachusetts in 1981 joined other states in amending its usury statute to raise the ceilings on interest rates for state-chartered financial institutions.[15/] The Commonwealth and 14 other states elected to opt out of DIDA preemption as allowed under section 525.[16/] Massachusetts raised its usury limit on open end credit card accounts to an across-the-board level of 18% and prohibited the levy of late charges on Massachusetts credit card

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15/ Mass. Gen. L. ch. 140, §114B, amended by Mass. Stat. 1981, ch. 384, §1.

16/ See 12 U.S.C. 1730g.

customers.[17/]

In contrast to the efforts of Massachusetts and states which sought to preserve usury laws through reform, a handful of states, most notably Delaware and South Dakota, responded to the credit crisis and the Marquette decision by passing laws which virtually eliminated interest rate and other usury restrictions.[18/] Delaware, in an effort to attract credit card issuers, completely deregulated its credit card issuers, encouraging banks such as

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17/ See note 15. In 1984, the 18% limit was modified slightly under circumstances not here relevant. Mass. Stat. 1984, ch. 489, §1.

18/ See Burgess & Ciolfi, supra at 935-36.

Greenwood to locate there.[19/] (Def's Mem. Supp. Summ. J. at 2-3; Amici States Br. at 6).

The controversy presently before this Court is most immediately concerned with the preemptive sweep of DIDA's section 521 and the reach of the Massachusetts usury law, Mass. Gen. L. ch. 140, §114B. But this case, in a larger sense, is part of the constant

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19/ Delaware's 1981 Financial Center Development Act "among other things . . . eliminated rate limitations on all classes of loans, liberalized Delaware's consumer lending law, and established a favorable tax structure for banks." Richard P. Eckman, The Delaware Consumer Credit Bank Act and "Exporting" Interest Under Section 521 of The Depository Institutions Deregulation and Monetary Control Act of 1980, 39 Bus. Law. 1264-65 (1984) (footnotes omitted) ("Eckman"). See generally Del. Code Ann. tit. 5, §§941-974. The Consumer Credit Bank Act of 1983 was designed to encourage small banking organizations to locate in Delaware to engage in interstate consumer lending.

challenge to strike the proper balance of federalism in a society of constantly evolving needs and aspirations.

2. Pathways to Preemption and Comparative Burdens.

Greenwood argues that the Commonwealth's enforcement of the late charge provisions of its consumer protection statute would conflict with the antidiscriminatory consumer lending provisions of Section 521 of DIDA, 12 U.S.C. §1831d ("Section 521"). That section allows state-chartered banks insured under the Federal Deposit Insurance Act, to charge interest at a federal rate and preempts conflicting state laws, as follows:

(a) Interest Rates

> In order to prevent discrimination against State-chartered insured depository institutions, including insured savings banks . . . with respect to interest rates, if the applicable rate prescribed in this

> subsection exceeds the rate such State bank . . . would be permitted to charge in the absence of this subsection, such State bank may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section . . . charge on any loan or discount made . . . interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such bank . . . is located or at the rate allowed by the laws of the State . . . where the bank is located, whichever may be greater. (emphasis added)

By these literal terms, preemption under section 521 is limited to state interest rates which conflict with the federal rate permitted by that provision. It was, as noted above, the unprecedented rise in the Federal Reserve discount rate in the late 1970's which gave rise to DIDA. The plain meaning of section 521 does not evince Congressional intent to preempt state

regulation as to other credit terms, apart from interest rates, such as the late charges challenged by Massachusetts.

Greenwood and its allied amici argue that section 521's stated purpose, ". . . to prevent discrimination against State-chartered insured depository institutions" translates into a "national policy of providing [federally] insured [state] banks competitive 'rate' parity with national banks." (Def's Mem. Opp'n. Summ. J. at 8). Such an ambitious policy, it is said, necessitates broad preemption of not only numerical interest rates, but all state restrictions on credit terms (including late charges) which affect the profits of lenders. Id. at 8-9.

This larger Congressional intent is said by Greenwood to be manifest in the legislative history of section 521 and

unmistakably implied by Congressional policy objectives advanced in other provisions of DIDA, from interpretive decisions of various administrative agencies, and from court decisions interpreting either the National Bank Act or the meaning of "rates" under that or other federal consumer protection statutes.

Massachusetts, countering, essentially relies upon the plain meaning of the "interest rate" language in section 521 and the history of Congressional deliberations prior to enacting DIDA. That evidence is said to demonstrate that Congressional concern was limited to discriminatory interest rates favoring national banks, and that preemption was intended to apply only to state interest rate ceilings. State

usury laws thus would remain vital and controlling over non-interest rate credit terms. The amici states also assert that consumer credit protection is a fundamental local interest, long recognized by Congress, and not displaced by the sweeping preemption urged by Greenwood.

This Court's assessment of preemption under section 521 is framed by two essential questions:

First, did Congress intend a limited or broad incursion upon state usury laws? Was the aim to cure interstate discrimination only in interest rate ceilings (based upon the literal language of section 521) or is it implicit that the larger Congressional aim was to establish a more uniform national credit card lending framework?

Second, did Congress impliedly intend by its use of the term "rates" in DIDA to preempt state law restrictions on all credit terms (including late charges) as well as state regulation of numerical interest rates standing alone?

The Court, in considering preemption claims, is cautioned by the longstanding presumption that "Congress did not intend to displace state law," Maryland v. Louisiana, 451 U.S. 725, 746 (1981), and that it should not unnecessarily disturb "the federal-state balance." United States v. Bass, 404 U.S. 336, 349 (1971). Indeed, greater restraint ought apply to preemption of spheres traditionally occupied by the states, as noted in the oft-cited language of Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947):

> Where . . . the field that Congress is said to have preempted has been traditionally occupied by the states . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless there was the clear and manifest purpose of Congress.

It is well settled that state usury law restrictions on lending practices are so extensive and historically rooted as to form part of the consumer protection terrain "traditionally occupied" by the states.[20/] Accordingly, "[b]ecause consumer protection is a field traditionally regulated by the states, compelling

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20/ See Lewis v. BT Invest. Managers, Inc., 447 U.S. 27, 38 (1980) ("We readily accept the submission that, both as a matter of history and as a matter of present commercial reality, banking and related financial activities are of profound local concern"). See generally Barbara A. Curran, Legislative controls as a response to consumer-credit problems, 8 Boston College Industrial and Commercial Law Review, 409, 413-15, 418-20 (1967).

evidence of an intention to preempt is required in this area." General Motors Corp. v. Abrams, 897 F.2d 34, 41-42 (2d Cir. 1990) (upholding New York's "Lemon Law" against a claim that a Federal Trade Commission consent decree preempted major elements of the local law).

Moreover, preemption analysis requires consideration of several distinct criteria. See Palmer v. Liggett Group, Inc., 825 F.2d 620, 624-25 (1st Cir. 1987). The crucial question underlying such an inquiry is always "whether Congress intended that federal regulation supercede state law." Id., quoting Louisiana Public Service Comm'n v. Federal Communications Comm'n, 476 U.S. 355, 369 (1986). Of course, express statutory terms are the

surest indicator of preemptive intent. Where provisions are unclear or fail to address the preemption question, a cautious resort to legislative history is called for. American Tobacco v. Patterson, 456 U.S. 63, 75 (1982). Implied preemption is more difficult to establish; one must consider "the relationship between state and federal laws as they are interpreted and applied, not merely as they are written [and] determine whether . . . . [they] are so inconsistent that the state law must give way . . . ." Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977); see also Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) (pointing to the "physical impossibility" of simultaneous compliance with federal and state laws as a directive for preemption).

Further, preemption may be inferred from the overall scope of a statute if Congress has legislated so comprehensively as to occupy the entire field and leave no room for interstitial regulation by the states, Rice, 331 U.S. at 230.

Finally, a litigant not anchored to specific federal provisions may argue that preemption is implicit because "state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress" as generally discerned in a federal statute. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984); Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

Greenwood embarks upon two routes to preemption. First, selected aspects of the legislative history of DIDA are singled out and highlighted as explicit

indications of Congress' broad preemptive intent. In the alternative, Greenwood and its amici banks seek to travel a more precarious route, attempting to imply preemption from the contradiction between the Massachusetts usury law against late charges and the accomplishment of what Greenwood calls a broad Congressional purpose to develop "competitive parity" between federal and state banks through a more uniform credit system. (Greenwood's Mem. Opp'n. Summ. J. at 8-9; Mastercard and VISA Br. at 3). Accomplishment of this larger Congressional purpose, according to Greenwood, requires that federal law preempt all state usury restrictions which "affect a lender's economic return." (Greenwood Br. at 13).

Greenwood's case for this overriding Congressional purpose depends

substantially upon an expansive reading of the "most favored lender" doctrine established by the National Bank Act of 1864 and elucidated in the landmark case of Marquette Nat'l Bank v. First of Omaha Service Corp., 439 U.S. 299 (1978) which antedated the enactment of DIDA by two years.

The Commonwealth, defending its usury restrictions, argues that Congress intended, when enacting DIDA and section 521 in particular, to preempt state laws restricting only numerical interest rates and "not those laws concerning non-interest rate loan terms." (Commonwealth's Mem. Supp. Summ. J. at 9). Championing the vitality of state prohibitions against late charges, the Commonwealth and the amici states cite the express terms of section 521, the legislative history of section 501

of DIDA, additional federal consumer statutes, and two state supreme court decisions.

3. Legislative History of DIDA and its Section 521.

The record of Congressional debate and deliberation concerning the enactment of DIDA is generally supportive of the Commonwealth's argument that preemption of credit card regulation under DIDA is confined to numerical interest rates. The central unifying purpose of DIDA was to provide for increased access to home mortgage loans. Section 501 of DIDA provided for preemption of state usury limits on mortgage loans in a manner virtually identical to the treatment of other loans (including credit card agreements) in Title V, which contains the disputed section 521.

Massachusetts cites the Senate Report of deliberations over section 501 of DIDA which limits preemption and expressly exempts "late charges." Senate Report N. 96-368, 96th Cong., 2d sess. 19 (reprinted in 1980 US Code Cong. and Ad. News, Vol. 2, 236, 255):

> In exempting mortgage loans from state usury limitations, the Committee intends to exempt only those limitations that are included in the annual percentage rate. The Committee does not intend to exempt limitations on prepayment charges, attorney fees, late charges or similar limitations designed to protect borrowers.

Greenwood dismisses this Senate Report as irrelevant because it was prepared prior to consideration of section 521. Greenwood's view, however, disregards the subsequent legislative history which links preemption concerns in section 501 both to the consideration of section 521, and to DIDA in its

entirety as passed on March 27-28, 1980. Massachusetts points out that Congress passed section 501 at the same time, and in the same title (Title V) of the same act, as section 521. (Commonwealth Reply at 2.)

During discussion on the Senate floor of the various bills which figured in the development of DIDA, Senators Pryor and Bumpers proposed an amendment to give state-chartered institutions "competitive equality" with national banks by allowing them to charge interest at one percent above the federal discount rate. S. 1988, 125 Cong. Rec. 30655 (November 1, 1979). Senator Proxmire, floor manager of the Senate bills under discussion, and chairman of the Senate Banking Committee, understood the proposed

amendment to override state usury laws and emphasized that there was "a sharp division and difference of opinion in the Senate." Id.

Separate hearings on the Pryor-Bumpers initiative, S. 1988, 96th Cong. 1st Sess. (1979) were held on December 17, 1979, and, though it was not reported out of committee, the bill's language was substantially incorporated into House Bill 4986, H.R. 4986, 96th Cong., 1st sess. (1979), which was, in turn, enacted as DIDA. Burke & Kaplinsky, supra, at 1096-97 and n.102; Usury Lending Limits Hearings.

Greenwood and its amici assert that Congressional commitment to a "national policy" of "competitive rate parity" through uniform national credit terms is manifest in the Senate consideration of

the Pryor-Bumpers bill, S. 1988. They have emphasized certain testimony at the Usury Lending Limits Hearings from various agency administrators and financial industry officials as evidence of a sweeping intent to eliminate all discrimination in credit terms between state banks and national banks. (Consumer Bankers Association's Br. at 13 [citing Usury Lending Limits Hearings at 2, 19, 20-21, 32, 36, 37, and 153-54]; American Financial Services Association's Br. at 8-11).

A fair reading of the legislative history, however, indicates that Congressional concern was focused with particularity on numerical interest rates. In introducing S. 1988, Senator Pryor noted, "A national bank may charge one percent above the Federal discount

rate, notwithstanding any State laws setting an interest-rate ceiling . . . [which] obviously discriminates in the strongest possible way against State banks." 125 Cong. Rec. 30655 (November 1, 1979). The great bulk of the subsequent committee testimony and discussion indicates that the proposed preemption amendment was limited since, in Senator Pryor's words, it "would merely allow State chartered, federally insured banks . . . to charge the same interest rate as national banks." Id. In fact, there were only two references to wider displacement of state law through expansion of the "most favored lender doctrine;" and these are the references upon which Greenwood relies so heavily in inferring a broader

Congressional purpose.[21/] Senator Bumpers, co-sponsor of the preemption amendment, confined his remarks to numerical interest rate disparities and remarked pointedly, "I do not think it is particularly healthy to be overriding state law." Id.

Even if the sponsors and supporters of DIDA preemption provisions were shown to be committed to achieving total competitive equality of all lending terms offered by state banks and national banks, Greenwood fails to come to terms with the simultaneous and persistent concerns of the bill's sponsors to preserve state consumer protection. During Senate consideration of the conference report on March 27,

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21/ See Usury Lending Limits Hearings, supra, at 32, 36, 37, 64-65, 151, 153-54; see also Burke & Kaplinsky, supra, at 1096-97 and n.105.

1980, Senator Proxmire emphasized the limited preemptive scope of Title V.[22/] This limitation in DIDA's Title V is clear from the Senate floor

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22/ 126 Cong. Rec. S. 6900 (March 27, 1980).

> [T]he Government must seek ways to remove competitive restrictions . . . .
>
> Title V does this by preempting various usury laws while giving each State the opportunity to re-establish its usury limitations if it desires to do so. . . .
>
> . . .
>
> I wish to reemphasize the point made initially in the Senate Banking Committee report that in exempting mortgage loans from State usury limitations, we intend to exempt only those limitations that are included in the annual percentage rate. We do not intend to exempt limitations on prepayment charges, attorneys' fees, late charges or similar limitations designed to protect borrowers.
>
> . . .

(footnote continued)

discussions of mortgage loans, from the Senate Banking Committee Report, and from the hearings on DIDA in the House of Representatives.[23/]

(footnote continued)

> Title V also contains a provision which provides parity, or competitive equality, between national banks and State chartered depository institutions on lending limits.

23/ An official of the Federal National Mortgage Association, in response to an inquiry by Rep. St. Germain, Chair of a House subcommittee considering DIDA, referred to the Senate Banking Committee Report cited above and stated:

> This expression of legislative intent not to displace state laws designed for consumer protection with regard to charges other than charges treated as interest would leave in place those protective enactments in the various states that relate to prepayment penalties, late charges, regulations on disclosure of interest charges and restrictions on other costs in connection with loan transactions other than interest.

(footnote continued)

Greenwood's arguments for implied preemption as necessary to implement a clear Congressional goal can hardly stand if Congress actually sought to accommodate state usury restrictions in section 521. It is not surprising, therefore, that Greenwood and its amici ignore entirely the significance of the override provision of section 521, codified at 12 U.S.C. §1735f-7 Note, which is also common to section 501 and other sections of the statute. Those provisions expressly provided that states could, within three years of April 1, 1980, declare that they wished not to be bound by the Act's limited preemption of their states' laws.

(footnote continued)

Regulation Q. and Related Measures: Hearings Before the Subcommittee on Financial Institutions of the Committee on Banking, Finance and Urban Affairs, 96th Cong., 2d Sess. 125-26 (1980). (emphasis added)

Massachusetts so declared on June 4, 1981.[24/]

24/ Mass. Stat., 1981, ch. 231, "An Act Exempting the Commonwealth From the Usury Preemption Provisions of the 1980 Deregulation and Monetary Control Act," approved June 4, 1981 and effective by operation of law September 4, 1981. The opt-out provision refers to "loans, mortgages, credit sales and advances made in this commonwealth," (emphasis added), and it expressly refers to section 521 of DIDA. A 1986 amendment expressly applied to out-of-state loans by Massachusetts banks. Mass. Stat., 1986, ch. 177. Though it refers to "loans, mortgages, credit sales and advances," it does not refer to section 521 of DIDA.

The prohibition of late charges in open-end credit accounts, contained in Mass. Gen. L. ch. 140, §114B, was enacted on August 6, 1981, and became effective by emergency declaration of the Governor filed August 19, 1981. Mass. Stat., 1981, ch. 384, §1. Thus, the late charge prohibition was law when the Commonwealth's preemption opt-out became effective on September 1, 1981. By implication, then, Massachusetts intended that DIDA not preempt its legislative decision to prohibit late charges on open-end credit accounts. A question left open is whether the Massachusetts legislature thought its provision applied to late charges on loans originating in another state, such as Delaware. See infra at 57-62.

By April 1, 1983, 14 other states and Puerto Rico had similarly chosen not to be bound by DIDA preemption.[25/]

The Commonwealth, relying on this history, argues that in the face of Congressional silence as to the specific preemptive intent of section 521, the Court may reasonably infer that Congress intended to give the same limited meaning to preemption provisions throughout Title V of DIDA. See

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25/ The other 15 opt-outs include: Alaska, Colorado, Georgia, Idaho, Iowa, Kansas, Maine, Minnesota, Nebraska, Nevada, North Carolina, Puerto Rico, South Carolina, South Dakota, and Wisconsin. See One Hundred Years of Ineptitude, 70 Va. L. Rev. 1101, 1109 n.92 (1984). The Court notes that five of these states have joined as amici in support of the Commonwealth. It also notes that the second amicus in support of the Commonwealth, the American Conference of Uniform Consumer Credit Code States, is filed on behalf of six of the above states, plus Wyoming, Indiana, and Oklahoma.

Firestone v. Howerton, 671 F.2d 317, 320 n.6 (9th Cir. 1982) ("We follow the well-known maxim of statutory construction that, when the same terms are used in different sections of a statute, they receive the same meaning"); accord, Little People's School, Inc. v. United States, 842 F.2d 570, 573 (1st Cir. 1988).

Post-DIDA legislative history tends to confirm the conclusion that Congress in 1980 did not intend to bar states from prohibiting late fees by credit card issuers. In 1981 and in 1983-84 the Senate (but not the House) passed amendments to DIDA which would have expanded preemption of state usury laws, but would have expressly exempted late charges from preemption. Hearings on S. 730 Before the Senate Committee on Banking, Housing and Urban Affairs,

April 12, 1983; Hearings on S. 1720, 1981.[26/]

26/ S. 730, the "Credit Deregulation and Availability Act of 1983," would have amended Title V of DIDA to provide, in relevant part, as follows:

> Sec. 531. The provisions of the constitution or laws of any State prohibiting, restricting, or in any way limiting the rate, nature, type, amount of, or the manner of calculating or providing or contracting for covered charges that may be charged, taken, received or reserved shall not apply to an extension of consumer credit made by a creditor.
>
> Sec. 532.(a) As used in this part--
>
> (1) The term 'covered charges' means--
>
> (A) interest, discount, points, a time price differential, or any similar fees, charges, or other compensation paid to the creditor and arising out of the credit agreement or transaction for the use of credit or credit services. The term shall not include, however, fees, charges, or other amounts paid to the creditor or arising out of the credit agreement or transaction that are paid or arise solely as the result of

(footnote continued)

The failed S. 730 bill also expressly granted states the right to override preemption.[27/] The consistent and express limitations of these later bills certainly comport with Massachusetts' reading of the predecessor section 521 as confined to preemption of interest

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(footnote continued)

the failure or refusal of the debtor to comply with the terms and conditions of the debtor's agreement with the creditor, including without limitation the fact that the obligation is not repaid in accordance with the payment schedule. . . .

129 Cong. Rec. S. 17045-17046 (November 18, 1983) (emphasis added).

27/ It would also have given continuing effect to Massachusetts' 1981 override of the DIDA preemption provisions: "In addition, the bill preserves the actions of those States which have already rejected the Federal preemption of business and agricultural interest rate ceilings contained in the 1980 Act." 129 Cong. Rec. S. 2332 (March 8, 1983) (Statement of Senator Garn).

rates only.[28/]

Both the California and Texas Supreme Courts, after reviewing the legislative history of DIDA, afforded Title V only a narrowly construed

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28/ At lease one commentator who has advocated the position taken by Greenwood here does not understand Congress to have permitted preemption of non-rate charges by enacting DIDA:

> Whether Marquette presages a far-reaching federal choice-of-law principle or one that only applies to interest rates in another issue for future resolution. . . . Case-by-case resolution of the issues discussed here is an unattractive prospect. Consequently, Congress and the appropriate regulatory agencies should be strongly encouraged to adopt new legislation or regulations that will clearly authorize national banks and other federally insured depository institutions to export annual fees and other non rate charges.

Jeremy Rosenblum, Exporting Annual Fees, 41 Bus. Law. 1039, 1046-47 (1986).

preemption of their states' usury laws. In Seiter v. Veytia, 756 S.W.2d 303, 304-05 (Tex. 1988), the court held that section 501 did not preempt Texas law relating to usurious late charges. There, a seller of residential property, while conceding that DIDA was not intended to cover late charges on mortgage loans, argued that state law was nonetheless preempted since under Texas law late charges are considered interest and thus a part of the annual percentage rate. The court rejected the contention that state law could be used to define interest more broadly than Congress had intended. Id. at 305.[29/]

In Perdue v. Crocker Nat'l Bank, 702

29/ Seiter reached this result even though Texas had not chosen to exercise its right to opt-out of DIDA preemption under section 501(a)(2)(B). Id. at 304.

P.2d 503 (Cal. 1985), appeal dismissed, 475 U.S. 1001 (1986), the California Supreme Court considered another section of DIDA which provided for gradual removal of federal regulations limiting interest paid to depositors. The court held that neither DIDA nor the National Bank Act preempted state regulation of bank service charges for overdrafts, relying on the language of the Senate Report regarding "late charges or similar limitations designed to protect borrowers." Id. at 522-23 and n.37 (quoting Sen. Rep. No. 96-368, 1st Sess., P. 19 [1979]). Though not squarely on point here, Perdue does reinforce skepticism that in enacting DIDA Congress intended more than a limited intrusion into state substantive regulation of consumer transactions.

4. An Evolving Preemptive Purpose? The "most favored lender" doctrine under the National Bank Act, Marquette, and administrative decisions.

Greenwood and its amici argue that the statutes, administrative and court decisions which preceded DIDA point to a Congressional commitment to the equalization of credit terms in interstate banking and a legacy of widening preemption. Congress' purported intent to encourage uniform lending practices through section 521 is said to be a logical consequence of the "most favored lender" doctrine created in the National Bank Act of 1864 and developed in jurisprudence capped by the Marquette decision of 1978. Greenwood's Reply at 2; Greenwood's Mem. Opp'n. Summ. J. at 13-14. Greenwood would have this Court apply the familiar rule that "Congress is presumed to be aware of an

administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change." Merrill Lynch, Pierce Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 382 n.66 (1982) (citations omitted) (quoting Lorillard v. Pons, 434 U.S. 575, 580-81 [1978]).30/

The available legislative history, discussed above, affords little support for Greenwood's argument that Congress, in enacting section 521, sought to develop fully the most favored lender doctrine and thereby eliminate all differences in national and state

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30/ See Carolene Products Co. v. United States, 323 U.S. 18, 26 (1944) ("When words employed in a new statute had, at the time, a well known meaning in the law, the words are deemed to have been used in the sense of such meaning unless the context requires a different interpretation").

restrictions on credit card lending terms.[31/] However, some friendly authority is found in administrative decisions which deem the most favored lender doctrine from section 85 of the National Bank Act to have been incorporated in section 521 of DIDA. Greenwood notes that the language of section 30 of the National Bank Act which, as amended, is today 12 U.S.C. 85, closely parallels that of DIDA section 521, authorizing state-chartered banks to charge interest "at the rate allowed by the laws of the State . . . where the bank is located." Since 1936, the Comptroller of the Currency, the agency charged with enforcement of the National Bank Act, has interpreted section 85 as allowing a

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31/ See Burke & Kaplinsky, supra, at 1094-99.

national bank to "export" to its operations in other states any interest rate permitted to competing lenders by the state law of the state in which the national bank is chartered. See 12 C.F.R. §7.7310(a) (1978). This is the "most favored lender doctrine" as originally enunciated in Tiffany v. National Bank of Missouri, 85 U.S. [18 Wall] 409 (1874).[32/]

32/ Actually, Tiffany held only that section 85 permitted a national bank to charge the interest rate allowed to natural persons by the state where the national bank is located, even if that rate exceeds the rate allowed to state-chartered banks. The case "left unanswered the question of whether 'the rate allowed by the laws of the State . . . where the bank is located' includes the special state interest rate statutes applicable to regulated lenders which typically constitute exceptions to a state's general usury law. The same question remains unanswered under sections 521 through 523 of [DIDA]." Burke & Kaplinsky, supra, at 1096.

The Supreme Court, in Marquette, 439 U.S. at 314 n.26 (noting, with apparent approval, the Comptroller's interpretation) relied on the National Bank Act and its most favored lender doctrine, to allow a national bank chartered in Nebraska to charge its credit card customers in Minnesota a rate of interest authorized in Nebraska, but prohibited by usury law restrictions in Minnesota. 439 U.S. at 313-15. The Marquette court recognized that the "exportation" of interest rates from a national bank's "home State" (where chartered) into a foreign state would "significantly impair the ability of States to enact effective usury laws," but it found that such impairment "has always been implicit in the structure of the National Bank Act since citizens of

one State were free to visit a neighboring State to receive credit at foreign interest rates." Marquette, 439 U.S. at 318 (citation omitted) (footnote omitted).

The Court suggested Congressional action would be necessary to check the preemptive effect of the National Bank Act in a time of national bank deregulation, tightened credit availability, and an increasingly nationalized credit card lending system:

> This impairment may in fact be accentuated by the ease with which interstate credit is available by mail through the use of modern credit cards. But the protection of state usury laws is an issue of legislative policy, and any plea to alter §85 to further that end is better addressed to the wisdom of Congress than to the judgment of this Court.

Id. at 318-19.

The decision in Marquette has been taken by lenders and issuers of credit cards to establish a de facto national interest rate, with exportation of the most profitable credit terms allowed under laws of lender-friendly states such as Delaware.[33/] It is notable that section 521, in seeming response to Marquette, contains express preemption language ("notwithstanding any State . . . statute which is hereby preempted for the purposes of this Section") which reaches beyond the preemptive scope of section 85 of the National Bank Act.

Greenwood's projections of sweeping Congressional purpose implying wholesale preemption are undone, however, by a closer reading of the reasoning in

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33/ See Burgess & Ciolfi, supra, at 935-36.

Marquette. The driving concern there was protection of the system of national banks established by the National Bank Act -- banks which have long been "National favorites" of Congress. Id. at 313-14. Congress assumed that each national bank was "located" in the state named in its organization certificate, with lending terms governed by the laws of that "home state." Id. at 310. If the Nebraska-based national bank was obliged to conduct its business in Minnesota under the latter's laws, its "location . . . [would] depend on the whereabouts of each credit card transaction," id. at 312, and such a result would "throw into confusion the complex system of modern interstate banking." Id.

The factual underpinning of Marquette cannot be ignored in the rush

of lenders to embrace the Supreme Court's general recognition of "the interstate nature of American banking" and the displacement of some state laws governing 'interstate loans' by the National Bank Act. Id. at 315, 318. Marquette preemption is limited factually to numerical interest rates, with no mention of the exportation of other credit card terms, such as late charges. Greenwood, as a Delaware-chartered state bank, is no "National favorite" as was the Nebraska bank, nor can Massachusetts' defense of its usury laws be equated with the position taken by Minnesota with respect to the Marquette bank, a position which the Supreme Court held so directly threatened the structure of the national bank system established under the National Bank Act. Delaware does not

enact law on behalf of Congress. The export of Delaware law to control the credit transactions of its banks in other states is not essential to preserve the legal identity of Delaware banks or the state banking system.

Even if it is accepted that section 521 is an outgrowth of Marquette, it does not follow that the particular Congressional purpose and preemptive sweep of the National Bank Act extend through Marquette to section 521 of DIDA. The Civil War Congress that enacted the original National Bank Act in 1863 expressly intended to create a national banking system,[34/]

34/ The nationalist nature of this legislation can hardly be overemphasized. As originally enacted in 1863 and amended in 1864, the National Bank Act was a significant war

(footnote continued)

(footnote continued)

measure designed to strengthen the central government and enable it to finance its widespread combat operations. After all, this is the same session of Congress that enacted the first draft law in our national history. "'The policy of this country,' [said] Senate Finance Committee chairman John Sherman, 'ought be to make everything national as far as possible; to nationalize our country so that we shall love our country.'" J. McPherson, Battle Cry of Freedom, 594 quoting Sherman's remarks as found in B. Hammond, Sovereignty and an Empty Purse: Banks and Politics in the Civil War, 326-27. Salmon P. Chase, Secretary of the Treasury, pressed for enactment of the National Bank Act "to augment the market for war bonds." J. McPherson, Battle Cry of Freedom, 593-94.

As Senator Robert C. Byrd remarks in his work, The Senate 1789-1989 at 258:

> Designed to replace the corrupt, decentralized, and inefficient system of state banks and bank notes, the National Banking Act was largely the work of Secretary [of the Treasury] Chase and Senate Finance Committee member John Sherman. It has three objectives. They include creation of a market for war bonds, reestablishment of the central banking system destroyed during the Jackson administration,

(footnote continued)

and exportation of rates by national banks was essential to prevent the discriminatory effects of state usury laws which traditionally favored state-chartered banks. 439 U.S. at 314-17. In contrast, the legislative history of DIDA, as already noted above, is extremely deferential to the state-federal balance, and the exportation of credit terms by state banks was apparently intended to prevent

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(footnote continued)

> and development of a stable bank-note currency. As amended in 1864, the Banking Act permitted banks to obtain federal charters and issue national bank notes up to 90 percent of their holdings of United States bonds. With modifications, this system remained the backbone of the nation's monetary structure until creation of the Federal Reserve System in 1913.

See Congressional Globe, 37th Cong., 3d sess., pp. 840-52, 896-97; L. Curry, Blueprint for Modern America: Non-Military Legislation of the First Civil War Congress (1968) 197-206.

intrastate discrimination by state laws favoring local banks against foreign state banks doing interstate business.[35/]

The most notable divergence between the National Bank Act and DIDA, of course, is that states were given no escape from National Bank Act supremacy, while section 525 of DIDA allows states to override the preemptive effect of DIDA by reasserting state usury ceilings otherwise preempted. 12 U.S.C. §1730g

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35/ "To the extent that national banks and federally insured institutions are not borrowing rates, they are not operating pursuant to authority conferred by the most favored lender doctrine. . . .

Institutions that export rates and terms from states such as Delaware with general credit laws [i.e., laws that do not discriminate against banks chartered in their states] are not borrowing the state law under which those terms are authorized. Only competitors' rates may be borrowed." Burgess & Ciolfi, supra, at 938.

note. (See Commonwealth's Mem. Supp. Summ. J. at 8 n.11.) Indeed, it is not at all clear that section 521 allows state banks to export even numerical interest rates to a state which, like Massachusetts, has opted out of DIDA preemption under section 525. The transubstantiation of the sweep of preemption under the National Bank Act via the blessing of Marquette into a like preemption under DIDA falters on this point. It is hard to square Greenwood's view that Marquette inspired section 521 with the fact that, "[t]here is only one reference to Marquette in the legislative history of sections 521 through 523 of the Act."[36/]

36/ Burke & Kaplinsky, supra, at 1104 and n.139 (citing statement of Georgia Commissioner of Banking).

Greenwood's portrayal of Marquette as the preemptive bridge over state usury laws which spans the distance from the National Bank Act to DIDA, does draw some support from one federal court and several agency informal interpretive rulings. In Gavey Properties/762 v. First Financial Sav. & Loan Asso., 845 F.2d 519 (5th Cir. 1988), the court held that under section 522 of DIDA, 12 U.S.C. §1730g(a), a savings and loan institution located in Illinois could export its most-favored lender rate on commercial mortgages to a resident of Texas, a state which has a lower ceiling. This, the court held, was not a usurious practice under Illinois law. The court in Gavey arrived at its result partly in deference to a 1982 advisory opinion of the Federal Home Loan Bank

Board ("FHLBB"). 845 F2d at 521.[37/]

In 1988, staff counsel of the FDIC issued an advisory opinion which also stated that section 521 incorporated Marquette:

> Section 521 preempts State usury laws in two ways. It gives insured State banks the right charge a Federally-prescribed rate on loans. It also says an insured State bank may 'export' its home state's interest rate -- i.e., that the bank

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37/ "[I]t is the view of this Office that the most favored lender status conferred by §522 on insured institutions necessarily includes the export aspect of Marquette." FHLBB General Counsel Opinion Letter (Aug. 6, 1982).

Significantly, however, while section 501 of DIDA expressly granted the FHLBB the power to issue regulations concerning preemption of state usury laws, the regulations which have resulted reflect the limited preemptive intent of Congress: "Nothing in this section preempts limitation in state laws on prepayment charges, attorneys' fees, late charges or other provisions designed to protect borrowers." 12 C.F.R. §590.3(c) (1989). (emphasis added)

> may charge the highest rate allowed in the State where the bank is located, no matter where the borrower may be located.

Opinion of Douglas H. Jones, Deputy General Counsel, FDIC-88-45 (June 29, 1988) Fed. Banking L. Rep. (CCH) §81.110.

The FDIC opinion further stated that the State's right under section 525 to "countermand" federal preemption "belongs to the State where the loan is made. . . . The fact that a State has countermanded under section 525 should not affect the usury preemption of section 521 for a bank not located in that State, so long as the loan is not made in the State that has countermanded." Id.

On its face, this opinion seems to support Greenwood's view that the Commonwealth's having opted-out of DIDA cannot trump Greenwood's right to export

its interest rates pursuant to Delaware law and Marquette. The opinion also noted, however, that the purpose of section 525 was to "preserve principles of federalism. Recognizing that section 521 deprived States of authority over matters traditionally committed to State control, Congress enacted section 525 in order to enable States to recover authority that section 521 had taken away." Id. It seems difficult to square the result reached by the FDIC counsel with his concerns for federalism: that is, why should Massachusetts, a sovereign state, be deprived of authority over the traditional matter of setting its own usury limits on the ground that Congress prohibited Delaware from maintaining laws discriminating against its own state-chartered banks such as

Greenwood?[38/]

38/ Greenwood's heavy reliance on various informal administrative opinions (also known as informal interpretive rules) raises an important question of the weight to be accorded them here. See Greenwood, Exs. A-G.

Federal regulations, as distinguished from informal agency opinions, generally have the same preemptive effect as federal statutes. Wood v. General Motors Corp., 673 F. Supp. 1108, 1114-15 (D. Mass. 1987) (citing Federal Savings & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 [1988]), rev'd on other grounds, 766 F.2d 630 (1st Cir. 1985). Yet even formal agency regulations "can not exceed the statutory authority by going beyond recognized limits to the congressional mandate." Alexander v. Trustees of Boston University, 584 F. Supp. 282, 285 (D. Mass. 1984) (citing Batterton v. Francis, 432 U.S. 416, 428 [1977]). A court reviewing such regulations must "reasonably be able to conclude that the grant of authority contemplates the regulations issued." Id. (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 308 [1979]).

Though interpretations of a statute by officers of the agency charged with its administration are entitled to great deference, Udall v. Tallman, 380 U.S. 1,

(footnote continued)

(footnote continued)

16 (1965), such "traditional deference . . . is not to be applied to alter the clearly expressed intent of Congress". Board of Governors of Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361, 367 (1986). Interpretive rulings of an agency administrator "'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier -- and later -- pronouncements, and all those factors which give it power to persuade, if lacking power to control'." General Electric Co. v. Gilbert, 429 U.S. 125, 141 (1976) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 [1944]). See Perdue v. Crocker Nat'l Bank, 702 P.2d at 519.

One benchmark suggested for whether a court properly defers to agency statutory interpretations is whether the interpretation is peculiarly within the expertise of the agency on the one hand, or the court on the other. Breyer, Administrative Law and Policy, 274-88 (1985). Under this standard, the technical expertise in monetary and financial matters of the agencies charged with carrying out DIDA is

(footnote continued)

(footnote continued)

certainly to be respected. On the other hand, Constitutional issues of federalism and preemption are particularly within the court's purview.

Generally, a court has discretion to substitute its de novo interpretation for agency interpretive rules. 2 K. Davis, Administrative Law Treatise, §7:8, pp. 36-37; §7:13, p.59; 1989 Supp. at 247-48 (2d ed. 1979) (citing cases).

In particular, informal interpretive rules written by staff members are generally accorded less weight than the formal interpretive rulings of an agency administrator. See Burke & Kaplinsky at 1098-99 (Agencies such as the FDIC have general interpretive authority under the statutes that were amended by sections 521-23). "It would thus appear that the interpretations of the agencies themselves, as opposed to the interpretations of their staffs, should be given the same degree of deference as Federal Home Loan Bank Board interpretations of section 501 of the Act." FHLBB has explicit statutory authority to promulgate regulations to implement section 501. Compare 12 C.F.R. §590.3(c) (1989) discussed in n.37 above (codified FHLBB regulation stating that preemption under section 501 is limited) with FHLBB staff counsel's advisory opinion relied upon by Gavey.

(footnote continued)

In sum, notwithstanding the scattered suggestions in informal administrative interpretations, Marquette's discussion of the National Bank Act does not teach a general dynamic of ever-expanding preemption or a Congressional strategy of uniform credit regulation which extends irresistibly to displace all state restrictions on state banks. Nor can

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(footnote continued)

Thus, though the brief, informal staff administrative opinions proffered by Greenwood are entitled to the Court's careful consideration, they should not be given conclusive effect. This Court must review them in light of the substantial evidence of DIDA's limited preemptive effect and the stated continued Congressional deference given to state consumer protection laws. They should be weighed with all other evidence probative of Congress' intent.

For a criticism of expansive agency interpretations of preemption in this general area, see generally James G. Kreissman Administrative Preemption in Consumer Banking Law, 73 Va. L. Rev. 911 (1987).

preemption by necessity be implied logically from Gavey, based as it is upon deferential incorporation of FDIC administrative opinions which are themselves contradictory as to the scope of preemption and the breadth of Congressional purpose in enacting DIDA.

5. Exportation of Non-Interest Rate Terms.

Even if it were established that Congress intended to establish full parity between national and state banks and that the Massachusetts opt-out legislation to avoid sweeping preemption was entirely ineffective, the imposition of late charges on Massachusetts credit card customers would still not be assured. The displacement of state law under DIDA's section 521 is limited to "Interest rates" or "the rate allowed by laws of the state," virtually the same language as is found in the National

Bank Act. The Commonwealth argues that "rate" refers to numerical periodic interest rates, while Greenwood understands it to be an inclusive term extending to, "all provisions [including late charges] that affect the economic return 'on a loan' to a lender." (Greenwood's Mem. Supp. Summ. J. at 12-13.) This point is at the heart of the dispute, and it is here that the law is most unsettled and support for Greenwood most attenuated.

As noted above, neither the plain meaning of the terms "rates" and "interest rates" in section 521 of DIDA and section 85 of the National Bank Act, nor the legislative history of section 521 indicate that these terms carry the expansive meaning inferred by Greenwood. Alternatively, it is argued

that an inclusive definition of "rates" is implied by the extension of "most favored lender" status to insured state banks through DIDA and the capacity of such banks to export credit terms through Marquette. (Greenwood's Mem. Supp. Summ. J. at 12-16; Greenwood's Mem. Opp'n. Summ. J. at 13-15.) But the national bank's authorized exportation of lending terms in Marquette (under National Bank Act provisions) like the state bank's exportation in Gavey Properties (under DIDA) was, as a factual matter, strictly limited to numerical interest terms.

Greenwood relies on cases arising under the National Bank Act which did not involve exportation of terms to establish that "'the rate allowed by the laws of the State'" is recognized to

include, "any charge, fee or expense which affect [sic] the economic return a lender may receive." (Greenwood's Mem. Supp. Summ. J. at 7.) The first cited decision, First Nat'l Bank v. Nowlin, 509 F.2d 872, 876 (8th Cir. 1975), does not offer an expanded definition of the term "rates," but rather shows only that calculation of chargeable interest rates must take "the case law of the state" into account. Likewise, while the Sixth Circuit in Northway Lanes v. Hackley Union National Bank & Trust Co., 464 F.2d 855, 864 (6th Cir. 1972) did allow a national bank operating in Michigan to charge closing costs in conformity to Michigan state law governing state banks, it did not determine whether such charges were "interest" or another aspect of "rates."

Greenwood claims Massachusetts law itself supports a flexible conception of chargeable "rates" under DIDA. It notes the collection of an annual credit card fee is allowed in spite of Massachusetts usury laws because such a fee is not a "finance charge" and "bears no relationship . . . to any unpaid balance." Northampton Nat'l Bank v. Attorney General, 8 Mass. App. Ct. 809, 812 (1979) (Grant, J.). Such a ruling is hardly relevant here, however, where Greenwood contends that late charges are collectible precisely because they arise out of or in connection with the lending of money. (Greenwood's Mem. Opp'n. Summ. J. at 2.) Reliance on Rockland-Atlas Nat'l Bank v. Murphy, 329 Mass. 755, 760 (1953), is likewise misplaced, since that case emphasizes

that, "Elimination of all other expenses is an essential and natural part of the legislative scheme for prescribing the allowable rates of interest."

True, some authority supporting a more flexible and inclusive formulation of a chargeable "interest rate" is found in an interpretive ruling of the most favored lender doctrine by the Office of the Comptroller of the Currency ("Comptroller") which provided:

> If State law permits a higher interest rate on a specified class of loans, a national bank making such loans at such higher rate is subject only to the provisions of State law relating to such class of loans that are material to the determination of the interest rate.

12 C.F.R. §7.7310 (1971) (emphasis added).

While the administrative opinions of the Comptroller are persuasive only,

they do provide a useful framework of analysis, one frequently employed by the courts in "rate" determinations.[39/] Under this analysis, the question is whether a given provision of Delaware lending law is "material" to determining an interest rate and therefore fully exportable by Greenwood to supplant Massachusetts usury law. A broad interpretation of what is "material" is found in Equitable Trust Co. v. Sachs, A-60063/120-1/Fol.713 (Circuit Court of Baltimore City, Md., June 28, 1981 and

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39/ For example, in Partain v. First Nat'l Bank, 467 F.2d 167 (5th Cir. 1972), the Court considered the Comptroller's rulings and opinions as persuasive on the "materiality" determination but saw no need to delve into them since it was clear from Supreme Court precedent that compounding was "material" to the determination of an interest rate and thus home state provisions against compound interest made extraterritorial compounding by a national bank a violation of the National Bank Act.

September 16, 1981), cited in Burke & Kaplinsky, 1106, where the Court allowed a national bank to export an annual credit card fee to a state which prohibited such fees on the ground that the fee was "material" to the determination of "interest" under laws of the bank's home state.
This result is unusual, since such fees have not traditionally been considered as "interest" by courts or state legislatures.
See Northampton Nat'l Bank, 8 Mass. App. Ct. at 813.

The Comptroller has more recently opined that state law provisions defining the "category" or "classification" of a loan are "material" and therefore "exportable" by a national bank under the National Bank

Act. Comptroller Op. Letter no. 178, Fed. Banking L. Rep. (CCH) ¶85,259 (Jan 12, 1981). Late charge provisions would not be material under this analysis since they are not germane to classification of a loan or the computation of numerical interest.

The Commonwealth argues that late charges are functionally distinct from interest since, it says, the imposition or payment of the late charge does not result in Greenwood's forebearance of asserting its right of collection. See Perry v. Stewart Title Co., 756 F.2d 1197, 1207-08 (5th Cir. 1985) (Late charge of 4% on mortgage loan which is merely a bona fide fee for servicing late payments, is "not properly characterized as 'interest'"). Indeed, a Greenwood vice-president recognized

this distinction when he testified at his deposition as follows:

> The payment of a late fee per se does nothing to change the decision on whether we would extend further credit or suspend credit privileges, except that it relates to his overall payment pattern on his account. . . .
>
> . . .
>
> In my mind, finance charge is something that, as a consumer, I would expect to pay for having the privilege of extending my payments over a period of time. If I break my contractual arrangement and default . . . I would expect to either pay a penalty or have the right for someone else to charge me a penalty for the extra cost that they have experienced in trying to enforce their contract with me.

(Stormoen Dep. at 26, 62-63).

In sum, regardless of whether certain finance charges may be exported under Marquette and DIDA, the late charges here at issue do not involve the facilitation of credit which undergirds

the preemption provision of Title V of DIDA. Rather, they implicate a technical default and breach of the cardholder agreement. Whatever may be the merits of the financial or policy arguments that non-rate provisions are "material" to determination of interest rates, Congress regards late charges such as these in a class apart from interest rates generally.

Thus, whatever the merits of Greenwood's case for untrammeled interstate lending, DIDA preemption does not prohibit Massachusetts from enforcing its statute. Greenwood, in effect, asks this Court to take several unwarranted interpretive leaps to conclude that it has met its burden of establishing preemption. Prior case law under the National Bank Act, the

legislative history of DIDA itself, and recent scholarly commentary all demonstrate the unsettled character of the law in this area generally.

Principles of federalism operate with particular force to preserve traditional spheres of state regulation such as consumer protection through usury laws. The Commonwealth is entitled to enforce its laws absent a clear showing of preemption or interference with interstate commerce. The inclusion of a preemption override provision in DIDA, of which Massachusetts took advantage, underscores the presumption that the Commonwealth's law must be given force here. Greenwood has not met its heavy burden of showing preemption, and the Court declines, itself, to create the

sweeping policy of preemption which Congress since 1980 has refused to enact.

B. Choice of Law -- Delaware or Massachusetts?

Balked at preempting the Massachusetts usury law, Greenwood argues that under applicable conflict of laws rules, Delaware substantive law ought apply. Under generally accepted conflicts rules, the forum state (Massachusetts here) applies its own choice of law rules to determine whether its substantive law or that of another state (Delaware here) governs the issue in question. Restatement (Second) of Conflict of Laws §187(3) and cmt. h (1989 Supp.). See, e.g., Bushkin Associates, Inc. v. Raytheon Co., 393 Mass. 622 (1985) (Following the general rule of the Restatement, Massachusetts' choice of law rules applied to determine

whether Massachusetts or New York law applied to enforce an oral contract).[40/]

40/ Under Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496 (1941), a federal court in diversity applies the choice of law rules of the state in which it sits, since conflicts issues are matters of state law. Though the primary basis for the Court's jurisdiction here is federal question (to determine the scope of federal preemption under DIDA), the case was also brought pursuant to this Court's diversity jurisdiction. Thus, Klaxon governs the choice of law issue here, and the Court properly looks to the conflicts law of the forum, Massachusetts.

Further, "[b]ecause the Supreme Court has declined to determine the reach of the states' legislative jurisdiction in conflict-of-law situations, the definition of the boundaries has been left to state conflicts rules." Richard J. Bauerfield, Note, Effectiveness of Choice-of-Law Clauses in Contract Conflicts of Law: Party Autonomy or Objective Determination, 82 Colum. L. Rev. 1659, 1664 (1982). But see Allstate Ins. Co. v. Hague, 449 U.S. 302, 307-13 (1981), reh. denied, 450 U.S. 971 (1981).

Thus, this Court looks primarily to Massachusetts law to analyze the conflicts issue.

In Bushkin, the leading Massachusetts conflict of laws case, the Supreme Judicial Court of Massachusetts has provided some general guidance with respect to conflict of law, though it has not addressed the type of issue involved here. Thus, this Court must determine how it believes the Supreme Judicial Court would rule on the question at hand. In Bushkin, the court rejected traditional single-factor choice of law doctrine, such as the place of the making of the contract, or the State with the greatest "interest" in the issue, and instead used a broad, "functional" approach that looked to "various choice-influencing

considerations." Id. at 630-31; see Travenol Laboratories, Inc. v. Zotal, Ltd., 394 Mass. 95, 99 (1985). See also Shinberg v. Bruk, 875 F.2d 973, 975 (1st Cir. 1989); Bi-Rite Enterprises, Inc. v. Bruce Miner Co., 757 F.2d 440, 442-43 (1st Cir. 1985); Choate, Hall & Stewart v. SCA Services, Inc., 378 Mass. 535, 540-41 (1979).[41/]

41/ As Bushkin noted, "[al]most all states have abandoned the lex loci rule." Bushkin, 393 Mass. at 630-31. Implicit in this statement is a rejection as outdated of the reasoning in Seeman v. Philadelphia Warehouse Co., 274 U.S. 403, 407 (1927), which held that a contract for interest exceeding another state's usury limit was enforceable if the state where the contract was made permitted it. Thus, even assuming that the Cardmember Agreement here was made in Delaware, that fact cannot be dispositive as to whether Delaware or Massachusetts substantive contract law applies to an issue of usury. Indeed, Greenwood does not insist that Delaware law must be applied solely on the ground that the Agreement was made in that State.

For guidance, the court in Bushkin looked to the general choice of law principles set forth in section 6 of the Restatement (Second) of Conflict of Laws (1971) and to R.A. Leflar, American Conflicts Law (3d ed. 1977).42/

The issue in Bushkin was whether the Massachusetts or the New York Statute of Frauds should be applied to an alleged oral agreement between two parties where

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42/ Section 6(1) of the Restatement states that "[a] court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law." Massachusetts' general conflict of laws statute permits parties contractually to agree that the law of either Massachusetts or another state shall govern, "when a transaction bears a reasonable relation to this state and also to another state . . ." Mass. Gen. L. ch. 106 §§1-105(1); Massengale v. Transitron Elec. Corp., 385 F.2d 83, 86 (1st Cir., 1967). The parties here do not appear to dispute that the Cardmember Agreement bears a reasonable relationship to both Delaware and Massachusetts; the question is which state's law should prevail.

such an agreement was barred under the New York statute, but not under the Massachusetts statute. Unlike the case at hand, however, the parties in Bushkin were business entities engaged in a commercial contract who had not specified a choice of law therein. These crucial factual differences limit the precedential effect of Bushkin to its multi-factor analysis.

The issue here is rather whether Massachusetts law applies to prohibit Greenwood from enforcing the late charge provisions of the Discover Cardmember Agreement, notwithstanding the choice of law provision of the Agreement. That provision specifies that the Agreement "will be governed by the laws of the State of Delaware and applicable federal laws." Under the Delaware statute, a

credit card issuer located in Delaware may contract with cardmembers to charge any agreed-to interest rate, plus late payment fees on unpaid balances. Del. Code Ann. tit. 5, §§943, 950 (1990).

Emphasizing the disparity in bargaining power between Greenwood -- the Discover Card colossus -- and a credit card applicant, the Commonwealth maintains that "Massachusetts will not enforce a contractual choice of law clause where it is one of the 'boiler plate' terms in an adhesion contract between parties of disparate bargaining power." (Commonwealth's Mem. Opp'n. Summ. J. at 15.) It cites Ernest & Norman Hart Bros., Inc. v. Town Contractors, Inc., 18 Mass. App. Ct. 60, review den. 392 Mass. 1103 (1984), and In Re Maxcy, 45 B.R. 268, 270 (Bankr. D.

Mass. 1985) for this proposition, but neither of those cases clearly establish that adhesion contracts are per se unenforceable under Massachusetts law. In Ernest, a contract between a Massachusetts subcontractor and a Connecticut subcontractor contained both a choice of forum clause that "Connecticut law shall have jurisdiction in disputes between the parties" and a choice of law clause that "[t]he law of the place of the building (Massachusetts) shall govern." Id. at 62. The court treated the first clause as one for forum selection and refused to enforce it primarily on waiver grounds, although it also noted that the contract was one of adhesion. Id. at 66-68. The Massachusetts Appeals Court recognized, however, that the modern

view holds forum selection clauses generally enforceable, citing Fireman's Fund American Ins. Co. v. Puerto Rican Forwarding Co., 492 F.2d 1294, 1296-97 (1st Cir. 1974). Ernest at 64-65.[43/] In Maxcy, the Bankruptcy Court refused to enforce a contract primarily on a ground other than adhesion, though it used adhesion as an alternative basis for its holding. The Bankruptcy judge simply asserted that adhesion contracts are unenforceable, however; he engaged in no analysis of Massachusetts law. This Court finds these decisions unpersuasive.

43/ See M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10-11 (1972); Allstate Insurance Co. v. Hague, 449 U.S. 302, 324, n. 11 (1981) (Choice of law analysis applies where there is no forum selection clause; the "justifiable expectations" of contracting parties remain a major concern).

Contrary to the Commonwealth's assertions, the law in Massachusetts is that generally a court will not deny enforcement of a contract of adhesion unless it is unconscionable or in some other way fundamentally unfair. See Santos v. Lumbermen's Mutual Casualty Co., 408 Mass. 70, 86 (1990); Lechmere Tire & Sales Co. v. Burwick, 360 Mass. 718, 720-21 (1972).[44/]

This is the approach of the Restatement (Second) of Conflict of Laws (1989 Supp.), which Massachusetts decisions follow without exception since Bushkin. Under the Restatement, a contract of adhesion is enforceable

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44/ But see Edith Fine, Massachusetts Contract Cases and Choice of Law, 43 Mass. L. Q. 46, 48-49 (1958) (Citing older Massachusetts cases in which choice of law provisions in insurance contracts were disregarded, apparently on the ground that they constituted adhesion contracts).

unless the consent of the adherent was "obtained by improper means, such as by misrepresentation, duress, undue influence, or by mistake." Restatement, §187 cmt. b. There is no such evidence here. True, section 187 of the Restatement permits a Court to consider, as one factor, whether a choice of law provision is found in an adhesion contract, "namely one that is drafted unilaterally by the dominant party and then presented on a 'take-it-or-leave-it' basis to the weaker party who has no real opportunity to bargain about its terms." Restatement, §187 cmt. b. Though "[c]hoice-of-law provisions contained in such contracts are usually respected . . . the forum will scrutinize such contracts with care and will refuse to

apply any choice-of-law provision they may contain if to do so would result in substantial injustice to the adherent." Id.

Here, while the Cardmember Agreement is a contract of adhesion, its provision for late charges is neither unconscionable nor does it result in substantial injustice to the adherent. What's more, in view of the protection of the Commonwealth's consumer disclosure statute, Mass. Gen. L. ch. 140, §114C, the Court rules that the consent of the cardholders to such charges was not obtained by improper means.

Here, the choice of law provision unmistakably directs the parties to the law of Delaware. Still, analysis cannot end at this point. Under section 187(2)

of the Restatement, "The law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . unless . . .

> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in determination of the particular issue and which, under the rule of §188, would be state of the applicable law in the absence of an effective choice by the parties.

Under the Restatement, "[the] forum will apply its own legal principles in determining whether a given policy is a fundamental one within the meaning of the present rule and whether the other state has a materially greater interest than the state of the chosen law in the determination of the particular issue." Restatement §187, cmt. g. See Kronovet v. Lipchin, 415 A.2d 1096, 1105 (Md. 1980) (citing §187). Thus, under

section 187, a key consideration is whether the Commonwealth's usury statute, particularly its prohibition of late charges, amounts to a fundamental policy which it has a materially greater interest in enforcing than the policy by which Delaware permits a bank located in that state to assess late charges as interest.

The Commonwealth claims that under section 187(b) of the Restatement the Massachusetts usury statute itself expresses the "fundamental policy" of Massachusetts, a policy which outweighs Delaware's interest in permitting its banks to assess late charges in foreign states. This Court agrees.

Not every statutory enactment expresses a fundamental policy. "On the other hand, a fundamental policy may be

embodied in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of superior bargaining power." Restatement §187, cmt. g. See, e.g., Business Incentives Co. v. Sony Corp. of America, 397 F. Supp. 63, 67 (S.D.N.Y. 1975) (Despite agreement that New York Law apply, New Jersey has a strong public policy to protect relatively powerless consumer or small businessperson from more powerful commercial giants); O'Brien v. Shearson Hayden Stone, Inc., 586 P.2d 830, 833-34 (Wash. 1978), on recons., 605 P.2d 779, 780-83 (Wash. 1980) (Disregarding a choice of law provision in a broker's contract and holding that the state of Washington has a materially greater interest in protecting its

consumer-citizens than New York has in charging interest to Washington citizens); North American Bank, Ltd. v. Schulman, 474 N.Y.2d 383, 386-87 (Co. Ct. 1984) (Foreign law chosen permitted usury against a fundamental policy of the forum); Whitaker v. Spiegel, Inc., 623 P.2d 1147, 1153-54 (Wash. 1981), app. dismd. Spiegel, Inc. v. Whittaker, 454 U.S. 958 (1981). Turner v. Aldens, Inc., 433 A.2d 439, 442-44 (N.J. Sup. A.D. 1981) (Usury provision of New Jersey Retail Installment Sales Act applied to out-of-state creditors despite silence of statute and choice of law clause to the contrary in an adhesion contract, in view of the evil legislature sought to remedy).

In light of the significant body of authority on this point and the evident concern of Massachusetts with the

protection of its consumers generally, and through its usury statute in particular, this Court rules that Massachusetts law applies in the premises notwithstanding the contrary choice of law provision.

B. The Reach of Massachusetts Usury Restrictions Under Mass. Gen. L. ch. 140, §114B

Greenwood has one last arrow in its quiver. It lets fly with the brief contention which it touched on in oral argument that Mass. Gen. L. ch. 140, §114B does not prohibit Greenwood's conduct here. The parties have examined the express terms of section 114B and dispute whether its prohibition on late charges applies to unmentioned out-of-state lenders, such as Greenwood.

As discussed above, in 1981 Massachusetts joined a number of states which, in response to national bank

deregulation and tightened local credit, substantially amended their usury statutes to preserve the competitive position of state-chartered financial institutions.[45/] Among other measures, Massachusetts raised its usury limit from 12% to 18% on open end credit accounts, a category which includes credit cards. Mass. Stat. 1981, ch. 384, §1, amending Mass. Gen. L. ch. 140, §114B.[46/] This same statutory amendment also provides: "No creditor shall impose a delinquency charge, late charge, or similar charge on loans made pursuant to such an open end credit plan."

45/ See, e.g., Usury Lending Limits Hearings.

46/ See Mass. Stat. 1984, ch. 489, §1 for a subsequent amendment not here relevant. See note 17, supra.

The Commonwealth argues that Greenwood is prohibited by these express terms from imposing on Massachusetts customers the late charge provision in Greenwood's Cardmember Agreement. That Agreement is also challenged as unlawful for imposing "unfair multiple payments for single defaults" since "notwithstanding the late charge, a credit card lender continues to charge and accrue interest on all delinquent accounts."47/ This is said to constitute double-charging in excess of

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47/ Commonwealth's Mem. Sup. Summ. J. at 10 n.7. The Commonwealth makes this argument in the context of a complex technical discussion of the preemption issue, specifically case law interpreting the National Bank Act and the historical relationship between interest rates and noninterest charges, such as late payment fees. The intricacies of that discussion are not relevant to the legislative interpretation required here.

the 18% usury limit on open-end credit card accounts.

The Massachusetts statute, section 114B, is silent as to whether its late charge prohibition reaches out-of-state creditors. The Commonwealth argues that, since the reach of the statute is not by its terms restricted, it must extend to all creditors, in and out of state. It contends, "[t]he contrary interpretation requires the conclusion that the Legislature sought to prohibit late fees but failed to enact a statute which achieved this purpose for many Massachusetts consumers." Commonwealth's Reply at 12. This is hardly the Commonwealth's strongest argument and Greenwood at once counters that, because the provisions of another consumer statute in Massachusetts, Mass. Gen. L. ch. 255D, §1, do expressly

contemplate extraterritorial reach, the silence of section 114B indicates legislative intent that it not have the same effect or, at a minimum, demonstrates an ambiguity that requires resort to the legislative history of the crucial amendment to §114B -- Mass. Stat. 1981, ch. 384. Greenwood's Mem. Sup. Summ. J. at 15-16.[48/]

48/ Chapter 255D of the Massachusetts General Laws, enacted as part of Massachusetts' earliest consumer protection legislation in 1966, covers retail installment sales agreements (generally treated as purchase money security interests), as well as revolving credit agreements, such as department store credit agreements which contemplate repeated transactions and a revolving balance on finance charges. See, e.g., Herbert P. Wilkins, Revolving Credit Agreement, Retail Installment Sales, 51 Mass. L. Q. 233 (1966). Section One of chapter 255 excludes from the definitions of both types of agreements "an agreement signed by a nonresident buyer in the commonwealth if the buyer has agreed that the law of his state shall apply." This provision does

(footnote continued)

This Court has pursued this last line of inquiry, finding that the preponderance of available evidence indicates that the Massachusetts sponsors and supporters of section 114B, not unlike the Congressional sponsors of section 521 of DIDA, were primarily preoccupied with raising the numerical interest rate ceiling for Massachusetts-chartered banks so that they could compete effectively with other banks.

While Massachusetts legislative history is notoriously sparse, the record of debate and discussion concerning Mass. Stat. 1981, ch. 384 does exist, albeit in unofficial

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(footnote continued)

not support Greenwood, since it merely declines to extend Massachusetts' law to consumers who happened to reside in other states.

form.[49/] The minutes of the Massachusetts Senate floor debate concerning the bill that became Mass. Stat. 1981, ch. 384, while limited, do shed considerable light on the purposes of the statute.[50/]

The record of the enacting legislative session indicates that the fundamental purpose of Mass. Stat. 1981, ch. 384, §1 was to raise the ceiling on

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49/ In Massachusetts, the official Senate and House Journals contain only a record of action taken but no summary of debate. Similarly, there are no formal transcripts of Committee hearings. However, since the early 1970's, a news bureau, the State House News Service ("SHNS"), provides in the form of press releases unofficial records of action and selective debate from many, though not all, daily legislative sessions. Fortunately, SHNS recorded coverage of the floor debate of the bill that became Mass. Stat. 1981, ch. 384. In the absence of an official record, the SHNS releases are parsed here.

50/ SHNS, May 26, 1981, pp. 2-3; May 27, 1981, pp. 2-6.

finance charges Massachusetts-based credit card issuers could impose on open end credit accounts, in an attempt to dissuade such issuers from moving their operations out of state.[51/]

51/ Chapter 384 went into effect just prior to the effective date of the Massachusetts legislature's override of the federal preemption provisions of DIDA, though the legislature had acted to override DIDA before enacting the 1981 amendment to the usury law. The preemption override, approved June 4, 1981, became effective on September 4, 1981. Mass. Stat. 1981 ch. 231, "An Act Exempting the Commonwealth From the Usury Preemption Provisions of the Nineteen Hundred and Eighty Deregulation and Monetary Control Act." The amended usury statute, Chapter 384, was approved August 6, 1981 and became effective by emergency declaration of the Governor on August 19, 1981. Mass. Stat. 1981, ch. 384.

Section 2 of Chapter 384 for the first time regulated charge card agreements. That section was codified as Mass. Gen. L. ch. 255, §12H. Under section 12H charge card agreements contemplate no periodic finance charge but rather payment in full upon receipt

(footnote continued)

As sponsor of the bill which ultimately became Chapter 384, Senator John A. Brennan proposed the legislation as a compromise between those on the one hand who wanted no interest rate higher than the then-applicable 12%, and the banking industry on the other which argued for total deregulation.[52/]

(footnote continued)

of a monthly billing. Mass. Stat. 1981 ch. 384, §2, codified as Mass. Gen. L. ch. 255, §12H.

52/ SHNS, May 26, 1981, p.2. While the banking industry wanted total deregulation (See, e.g., 1981 House J., H-1233, deregulating finance charges on open end credit plans and providing for "[annual percentage rate] not in excess of that agreed upon by creditor and customer"), Senator Jack Backman charged that the Brennan amendment was overindulgent to the banks. Id. Senator John Parker, on the other hand, thought the amendment was "trying to take care of delinquent card holders." Id. at 4. Senator Brennan argued that his proposal was "a compromise. It serves both banks and consumers." Id.

Senator Brennan argued that some increase in the interest rate was necessary to forestall the flight of banks from Massachusetts to other states where higher interest rates were permitted:

> Brennan continued saying a number of states do not restrict banks from marketing cards in Massachusetts. In state customers are being charged 19 to 20 percent he said, because other states do not restrict issuers. Brennan claimed the realities of the situation are that many in state issuers will begin to move out of state if they can find unlimited interest rates. Brennan said state banks originally wanted unlimited rates in Massachusetts, but the Banks and Banking Committee worked up this compromise and agreed to put the limit up to 18%.

SHNS, May 27, 1981, p.5.

More significant, Senator Brennan pleaded for action on his compromise on the ground that, if Massachusetts lenders moved their operations to states with less restrictive laws,

Massachusetts would be unable to control the charges banks in those states could impose on its residents:

> Senator Brennan said the U.S. Supreme Court decided that the National Banking Act precludes state regulators from regulating banks chartered to do business in another state. He said he hopes the bill is not recommitted.

Id. at 5. The Brennan amendment was then adopted. Id. at 6.

It is a compelling inference that Senator Brennan was referring to the 1978 Marquette decision. It thus appears clear that the chief sponsor of the statute increasing the usury limit thought out-of-state banks beyond its reach.

The record points to the overriding concern of the Massachusetts legislature: viz. to provide Massachusetts banks with interest rates closer to those which banks could obtain

in some other states, yet to cap those rates at 18%. There appears to have been no discussion about precluding out-of-state banks from charging higher rates or imposing late charges on Massachusetts residents. Chapter 384, instead, was enacted to keep Massachusetts-based banks in Massachusetts while continuing to protect consumers through limitations on rates and charges. There is no direct evidence that the Massachusetts legislature ever considered the possibility that it might possess the authority to impose the terms of section 114B on out-of-state banks.[53/]

53/ The Court notes that prior to the passage of the Brennan amendment, the Massachusetts Senate in 1981 authorized a study of the impact of late charges specifically upon the availability of

(footnote continued)

The evil sought to be addressed by this legislation was the potential exodus of Massachusetts card-issuing banks to other states.

This is not to suggest that the

(footnote continued)

consumer credit and upon lenders. S. 20, proposed by Senator Robert Buell, an opponent of the Brennan amendment, provided:

> Resolved that the Joint Committee on Banks and Banking is authorized to investigate interest rates on credit cards, fees attached thereto, and consider the matter of free periods, imposition of late charges and delinquency charges and all other matters pertaining to credit cards. The Committee shall report the results of such study, if any, and drafts by June 30, 1981.

S. 20.

The Court has been unable to determine whether the S.20-authorized study was actually carried out; at least the Court has discovered no published version. Such a study might enlighten the Court as to the significance of late charges generally, though it seems extremely doubtful that such a study, if it existed, would point to a contrary result here.

Massachusetts Legislature was unconcerned about late charges or that the prohibition on late charges was unthinking surplusage. The record of enactment of Chapter 384 indicates legislative concern that either a charge card issuer or a card issuer pursuant to an open end credit account could, by imposing late charges upon a borrower's failure to make payments due in full, exceed the 18% usury limit established in the Act.

Senator Brennan expressed particular concern over the announced intention of American Express to impose late fees of 2.5% on balances due over 60 days on its charge card customers, or 25% per annum. SHNS, May 26, 1981, p.2; May 27, 1981, p.5. Sen. Brennan claimed that though his amendment would raise interest rates by 6%, it would save

Massachusetts consumers 7% by capping rates at 18%. Id., May 27, 1981, p.5.

These same concerns are echoed in a joint resolution of the legislation with an accompanying news release prepared in October of 1981 (after passage of section 114B). There, Massachusetts legislators described the banking statutes recently enacted during the 1981 legislative session (including section 114B) as indicating the Commonwealth's ". . . desire to retain control of its interest rate statutes by over-riding Title V [of DIDA]"; and called for rejection of proposed Congressional bills (S-1406 and HR-2501)[54/] which would "preempt state laws expressly limiting the nature,

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54/ See, C.I.S., Annual Abstract, 1981, S-241-46, pp.666-67.

rate, amount of or manner in which interest finance charges or other fees may be charged." SHNS, October 6, 1981. Representative Antoine Aguiar, Chairman of the Massachusetts Joint Committee on Banks and Banking, was outspoken in opposition to the additional preemption bills or the weakening of Massachusetts usury laws, declaring:

> The money lenders are now seeking the wholesale repeal of state usury laws. . . . In addition to giving money lenders nation-wide carte blanche to follow the lead of these [deregulating] states [e.g. Delaware], the [proposed] federal legislation also eliminates all prohibition on fees imposed by lenders. . . . These are the notorious hidden charges that we have fought for years to eliminate. . . . Consumers will no longer be able to comparison shop if federal preemption occurs.

SHNS, October 26, 1981.

The Legislature's joint resolution against further preemption and Senator

Aguiar's opposition to weakening state restrictions on "hidden charges" presumably includes protection against late charges. These declarations thus imply that Massachusetts legislators believed their newly enacted usury reforms (including section 114B) effectively protected Massachusetts citizens against the deregulated lending practices allowed in states like Delaware or proposed in preemption legislation then before Congress.

The after-the-fact rationalizations for legislative action provide, however, no sure footing for analysis and are widely considered unreliable as a source of legislative interpretation. See United States v. Wise, 370 U.S. 404, 411 (1962); Bobsee Corp. v. United States, 411 F.2d 231, 237 n.18 (5th Cir. 1969);

Chugach Natives, Inc. v. Doyon, Ltd., 588 F.2d 723, 731 (9th Cir. 1978). See also R. Dickerson, Interpretation and Application of Statutes, 179-80 (1975); Sutherland, Statutory Construction, §49.11 at 414-15 (4th ed. 1984). Greenwood argues that there are other more reliable indicia which support the conclusion that section 114B was never intended to apply to out-of-state lenders.

First, Greenwood argues that Massachusetts policy with respect to late charges cannot be a fundamental legislative goal since other consumer statutes in the Commonwealth either permit late charges or allow interest rates higher than the 18% cap found in section 114B (e.g., retail installment sales agreements and charge card

accounts). As to late charges, this argument ignores the fact that no finance charge is assessed on charge card accounts at all. Further, higher rates of interest under retail credit agreements typically are not prohibited by state usury statutes, since the merchant is primarily in the business of selling goods or services, not loaning money. See Curran, Legislative Controls as a Response to Consumer-Credit Problems, 8 B.C. L. Rev. 409, 413-415 (1967). Thus, Greenwood's argument in this respect is unpersuasive.

Second, Greenwood notes that the provisions of a related Massachusetts consumer protection statute, Mass. Gen. L. ch. 140, §144C, enacted in 1987 by Mass. Stat. 1987, ch. 565, required out-of-state issuers of credit cards to

disclose to customers any rates or charges imposed above the Massachusetts limits, and ordered state agencies to educate local consumers as to comparative rates and charges for both in-state and out-of-state banks.[55/] Section 114C did not, however, directly prohibit such elevated charges and rates by foreign lenders.

Greenwood stresses that since section 114C contained express terms making it applicable to out-of-state issuers of credit cards, in contrast to the silence of section 114B in that regard, by implication section 114B was not intended to apply to out-of-state

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55/ Section 114C also provides that a card issuer "whether located within or without the commonwealth, may assess an annual fee," subject to certain requirements for creditor notice and consumer entitlement to cancellation and refund without penalty.

creditors. Section 114C, however, was passed six years after section 114B, and therefore it cannot shed light on the legislative intent of the earlier statute. See, e.g., Andrus v. Shell Oil Co., 446 U.S. 657, 666 n.8 (1980) ("[A]rguments predicated upon subsequent Congressional actions must be weighted with extreme care [but] not rejected out of hand"); Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980) (Subsequent enactments and statements of Congress regarding restrictions on subsidized national flag vessels "cannot override the unmistakable intent" of the enacting Congress). Nor is it clear, logically, that section 114C supports Greenwood's statutory construction of section 114B's territorial reach, since section 114C, unlike section 114B which expressly

restricts late charges, just as expressly countenances an annual fee.[56/] On its face, section 114C expresses a non-discriminatory intent to treat out-of-state credit card issuers similarly to their in-state counterparts. The enactment of section 114C, therefor, sheds little light on the interpretation to be afforded to section 114B.

Greenwood's conclusion that section 114B was not intended to reach beyond Massachusetts' borders is buttressed, however, by the fact that the Commonwealth has presented no evidence

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56/ It will be remembered that the Massachusetts Appeals Court had previously held that a national bank located in Massachusetts could assess an annual fee in addition to the maximum allowable finance charge, interpreting such fees as independent of the method of calculating finance charges. Northampton Nat. Bank v. Attorney General, 8 Mass. App. Ct. 809 (1979).

of any previous attempts to enforce section 114B in such a way as to reach either interest rates or late charges imposed by out of state banks upon Massachusetts residents. Indeed, during the eight years prior to the filing of the present suit, out-of-state banks routinely charged interest rates to Massachusetts residents higher than the 18% cap permitted to Massachusetts banks.[57/]

57/ See Office of Commissioner of Banks, Quarterly Credit Card Issuer's Report, June 30, 1990. The official quarterly reports issued by the Commissioner are expressly required by the Massachusetts credit card disclosure statute. Mass. Gen. L. ch. 140, §114C. The most recent 23-page report lists several hundred in state and out of state credit card issuers and clearly illustrates the slight percentage differential in interest rates charged by in state and out-of-state banks to Massachusetts cardholders. The report does not list Greenwood Trust Company.

(footnote continued)

This, of course, is precisely the result one would expect following the Marquette decision with respect to out-of-state national banks. The evidence before the Court thus proves little more than that the Massachusetts banking authorities are complying with

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(footnote continued)

The report includes data with respect to annual percentage rates, grace periods, annual fees, and "other fees." Other fees are not further delineated. However, the Court notes that the underlying data form sent to credit card issuers in and out of the Commonwealth requests each issuer to list "Amounts of fees charged (if any)," and then includes spaces for annual fee, cash advance fee, late charge, over limit fee, and any other fees. The form may be obtained from the Office of the Commissioner of Banks.

The Office also publishes a quarterly newsletter which summarizes the results of the Card Issuer's Report and gives general advice to consumers to consider the relative advantages and disadvantages of each card issuer's terms.

the National Bank Act as interpreted in Marquette. Such evidence cannot be bootstrapped into a contemporaneous regulatory construction of an allegedly ambiguous statute.

For, in the final analysis, Mass. Gen. L. ch. 140, §114B is not ambiguous. While the Court has extended this opinion to analyze each of Greenwood's contentions, that analysis -- undertaken out of an excess of caution in light of the importance of the issue presented -- ultimately adds nothing to the plain language of the statute. The Massachusetts legislature has simply and unequivocally barred credit card late charges. There is, upon reflection, no occasion to go behind the plain language to speculate upon the policy motives behind this legislative mandate. Enough said.

IV. CONCLUSION

For all the foregoing reasons, the Court holds 1.) that the provisions of DIDA do not preempt the Massachusetts usury law; 2.) Massachusetts, not Delaware, law applies in the premises; and 3.) the prohibition on credit card late charges reaches out-of-state credit card issuers such as Greenwood.

Accordingly, Greenwood's motion for summary judgment is DENIED, and that of the Commonwealth is ALLOWED. As there is thus no occasion to consider the damages issue, judgment shall enter for the Commonwealth and its Attorney General. The parties shall submit a proposed form of judgment.

WILLIAM G. YOUNG
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

GREENWOOD TRUST COMPANY, Plaintiff,	)	
v.	)	CIVIL ACTION No. 89-2583-Y
THE COMMONWEALTH OF MASSACHUSETTS, and JAMES M. SHANNON, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, Defendants.	)	

SUPPLEMENT TO
THE COURT'S MEMORANDUM AND ORDER OF
OCTOBER 22, 1991

The Court, in its discretion, finds that final judgment should be entered with respect to those claims addressed in the Court's Memorandum and Order of October 22, 1991 ("the Order") pursuant to Fed. R. Civ. P. 54(b) or, alternatively, that the issues addressed in the Order should be certified for

immediate appeal under 28 U.S.C. §1292(b).

As grounds therefore, the Court finds that after the Order, the only claim remaining for resolution in this action is the Counterclaim brought by the Defendants ("the Commonwealth") pursuant to Massachusetts General Laws c. 93A and the only other issues to be addressed by this Court are those relating to the Commonwealth's claims for injunctive relief, restitution, civil penalties, and other remedies. All other claims that have been brought by the parties have been fully and finally adjudicated and resolved.

An immediate appeal would aid in the efficient resolution of this case because the Commonwealth's remaining claim under Chapter 93A is only viable, as a matter of law, if the Court is

upheld with respect to its analysis in the Order. This is also true with respect to the remaining matter of the Commonwealth's claims for injunctive relief, restitution, civil penalties, and other remedies. The Court recognizes that the issues involved in the cases are novel and complex.

Pursuant to Fed. R. Civ. P. 54(b), therefore, the Court determines that there is no just reason for delay in certifying the judgment to be entered by the Court, with respect to the claims which have been resolved by the Order, as final and expressly directs the entry of final judgment as to those claims.

Moreover, pursuant to 28 U.S.C. §1292(b), the Court finds, in the alternative, that if Fed. R. Civ. P. 54(b) does not apply to any claim or claims relating to the Order, then with

respect to that claim or claims the Order: (1) involves controlling questions of law; (2) substantial grounds for difference of opinion exist on those questions; and (3) an immediate appeal from the Order may materially advance the ultimate termination of the case.

This Court further orders that by agreement of the parties and with the approval of the Court:

1. Greenwood Trust Company ("Greenwood") shall keep accurate records of all late charges both charged and collected by Greenwood from Discover Card cardmembers residing in Massachusetts after October 22, 1991. If the appeal, after all avenues of appeal have been exhausted, is decided in favor of the Commonwealth, then Greenwood shall pay back, within a

reasonable period of time, all such late charges which have been charged and collected, plus simple interest at an annual rate of 12% from the time of collection of each such late charge, to its respective Massachusetts Discover Card cardmembers. Such payments by Greenwood shall constitute full and final settlement of any and all claims brought by the Commonwealth against Greenwood in this suit with respect to all late charges both charged and collected after October 22, 1991. Any late charges, plus interest, for the period after October 22, 1991 through the date that all avenues of appeal have been exhausted, which cannot be returned to the respective Massachusetts Discover Card cardmembers (because of death or disappearance of the respective cardmember or for any other reason)

shall be paid to the Local Consumer Aid Fund.

2. If, after all avenues of appeal have been exhausted, such appeal is decided in favor of the Commonwealth, the parties shall then meet and prepare a Supplemental Case Management Order to address the remaining issues raised by the Commonwealth's Counterclaim under Massachusetts General Laws c. 93A, §4 with respect to late charges which have been either charged and/or collected prior to October 22, 1991.

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Dated: